Supreme Court, U.S.
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96 288 AUG 2 1 1996

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ROCCO ERNEST INFELISE, SALVATORE DeLAURENTIS, ROBERT BELLAVIA, WILLIAM D. DiDOMENICO, HARRY ALEMAN and JAMES A. NICHOLAS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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97 pp

QUESTIONS PRESENTED

1. Whether compelling Sixth Amendment interests require resolution of the circuit-splitting questions of when, and under what circumstances, defendants are entitled to an evidentiary hearing after they have circumstantially demonstrated an intentional governmental intrusion into the protected attorney-client relationship?

(a) Whether this Court's precedent requires that petitioners demonstrate prejudice resulting from intentional governmental intrusion into the attorney-client relationship in order to warrant an evidentiary hearing?

2. Whether the Sixth Amendment's mandate requiring verdict unanimity compelled the trial court to conduct plenary post-verdict inquiries after the jury foreperson reported a significant verdict recordation mistake?

PARTIES TO THE PROCEEDINGS

Petitioners Rocco E. Infelise, Salvatore DeLaurentis, Robert Bellavia, William DiDomenico, Harry Aleman, and James A. Nicholas were co-indictees in *United States v. Infelise, et al.*, 90 CR 87. Each petitioner was an appellant in *United States v. DiDomenico, et al.*, 93-1134, 78 F.3d 294 (7th Cir. 1996).

Petitioners Infelise and Bellavia seek leave to adopt the sentencing issues, arguments and authorities presented in the separate petition for writ of certiorari filed, or to be filed, by Louis Marino. Louis Marino was a co-defendant and appellant in *United States v. DiDomenico, et al., ante.*

The United States was the only plaintiff-appellee in these proceedings.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Rocco E. Infelise, Salvatore DeLaurentis, Robert Bellavia, William DiDomenico, Harry Aleman, and James A. Nicholas pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINIONS BELOW

The March 1, 1996 opinion and judgment of the United States Court of Appeals for the Seventh Circuit affirming the convictions and sentences under Indictment 90 CR

87 are reported at 78 F.3d 294 (7th Cir. 1996). The Seventh Circuit opinion and judgment is reproduced at pages 1a to 18a of the appendix to this petition.

Petitioners Infelise and Bellavia seek leave to incorporate and adopt the sentencing issues, arguments and authorities presented in the separate petition for writ of certiorari filed, or to be filed, by Louis Marino. Louis Marino was a co-defendant and appellant in the consolidated appeal below, *United States v. DiDomenico, et al.*, *ante*.

JURISDICTION

The jurisdiction of the district court was based on 18 U.S.C. § 3231. The United States Court of Appeals for the Seventh Circuit, with jurisdiction pursuant to 28 U.S.C. § 1291, issued its decision on March 1, 1996. A timely petition for rehearing, with *en banc* suggestions, was denied on May 23, 1996. The order denying rehearing is reproduced at 19a of the appendix to this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, in part, states:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution, in part, states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, . . . the accused shall . . . have the Assistance of Counsel for his defense.

STATEMENT

On February 6, 1990, the Special September 1987 Grand Jury empaneled in Chicago returned a multi-count criminal indictment against twenty defendants. Petitioners Infelise, DeLaurentis, Bellavia, and Aleman were named in count one, the RICO conspiracy count, which charged they were part of an organized crime enterprise involved in illegal activities from the early 1970s to the date of indictment return.

1. During February and March 1990, a series of pretrial release hearings culminated with the petitioners remaining in detention. In response to an appellate challenge, the Seventh Circuit directed the trial court to reconsider pretrial detentions.[1]

2. During the pretrial discovery phase, the government made available approximately 5,000 tape recordings involving the petitioners and others; the recordings were made between 1983 and 1989. To facilitate pretrial preparation for the pretrial detainees, the district court ordered that a secure room on the nineteenth floor in the federal Metropolitan Correctional Center (MCC), Chicago, Illinois, be set aside for the exclusive use of petition-

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[1] *United States v. Infelise, et al.*, 934 F.2d 103 (7th Cir. 1991) (on remand the trial court perpetuated pretrial detainment).

ers and defense counsel. The district court directed the government to install *listening equipment* so that the tapes (and transcripts) could be analyzed, compared and indexed. The government-supplied equipment lacked *recording capacity*.

At least twice weekly from the late spring of 1990 through late August 1991, petitioners and counsel met in the secured MCC room to prepare for trial, always amid assurances from the United States Attorney that there were no eavesdropping devices in the room.[2] During these bi-weekly meetings defense stratagem was reviewed and refined. Attorneys for the non-custodial defendants sometimes joined in as a means of facilitating joint defense pretrial motions and trial preparation.

3. *The discovered intrusion and subsequent events.*

During late August 1991, cassette tape recordings were delivered by unknown persons to three separate defense attorneys. The cassette recordings captured *custodial* conversations involving the petitioners and defense attorneys. Beyond peradventure, the taped conversations emanated from the custodial room set aside for attorney-client trial preparation. The defense attorneys immediately notified the Chief Judges of the Seventh Circuit

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[2] Consolidated pretrial defense motions requested written assurances from the government that the preparatory trial area was not the subject of government eavesdropping. In part, the government's written response included "there is no audio or video monitoring system or device in this room. Counsels' paranoia, whether real or dramatic, is wholly unwarranted"; R.792, pg. 2, n. 3.

and United States District Court in Chicago.[3] At the direction of [then] Chief Judge Bauer of the Seventh Circuit, the tapes were delivered to the United States Attorney for the Northern District of Illinois.

(a) On September 5, 1991, petitioners filed a written motion to continue the September 17, 1991 trial date. The trial prep room had already been sealed by the Department of Justice (DOJ). The Office of Professional Responsibility (OPR) sent two special agents to participate in the investigation. While eschewing pretrial release and waiving any right to a speedy trial, petitioners insisted that they were entitled to a complete investigation to determine the number and nature of electronic intrusions (Tr. of 9/5/91 at pp. 5, 9-19). The trial court held that, lacking allegations that the prosecution obtained or used any information that may have been gleaned from the cassette tapes, there was no need to adjourn the trial setting. *Id.* at 22-23. Nonetheless, the trial court continued the trial setting from September 17 to October 1, 1991. *Id.* at 24.

(b) On September 12, 1991, petitioners and all counsel appeared before the trial court. The trial court was advised that the DOJ investigation would take between thirty and forty-five days (Tr. of 9/12/91 at p. 6). The trial court learned that four tapes had been deliv-

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[3] The district court correctly noted that after the defense attorneys received copies of the tape, they immediately notified the chief judges as well as the United States Attorney in Chicago (R. 839, p. 1; App. 20a-21a). The affirming opinion erroneously asserts that a single defense attorney received a single tape and that that tape was tendered to the United States Attorney (App. 3a).

ered to three defense attorneys. *Id.* The government took the position that the petitioners had failed to assert that the prosecutors and agents responsible for the prosecution had been responsible for the taping. *Id.* at 10. According to the government, the cassette recordings could have been made by the defense. *Id.* The trial court took the position that prosecutorial team "taint" was the only impacting issue: Was taped information passed to the government trial team? *Id.* at 11-12; 18, 29-30, 34-36. Agreeing that a DOJ investigation would take thirty to forty-five days, and finding a paramount need to retain the October 1st trial date, the trial court ordered that the petitioners be transported each morning to defense attorney offices for trial preparation, then returned to the MCC each afternoon. *Id.* at 12; R. 809. The court's comments included:

> . . . If we're done with the trial of the case and some of these defendants are convicted *and that's when the investigation is over*, I will take a motion for NOV to set aside the judgment and I will set it aside.

Tr. 9/12/91 at p. 13. (Pet's Emph.)

> And I recognize that this is a burden on the government, *but this tape was made in a government facility, at the MCC.*

Tr. 9/12/91 at p. 15. (Pet's Emph.)

(c) On September 17, 1991, the trial court, while reaffirming the October 1, 1991 trial date, was advised that the United States Attorney for the Northern District of Illinois would no longer be participating in the eavesdropping investigation; Washington OPR was taking over (Tr. of 9/17/91 at pp. 2, 5).

(d) On September 20, 1991, petitioners were before the court. The trial court agreed to hold a hearing "... *whenever the investigations are done* ..." (Tr. 9/20/91 at p. 35; Pet.'s emph.). An affiant-expert filed a report and affidavit on September 20, 1991 (R. 822; App. 34a-48a). The affidavit and report, from a former chief investigator for the government, preliminarily found the taping to have all the earmarks of a professionally trained eavesdropper.[4]

Government trial counsel urged trial date retention and asserted that the only hearing needed was to determine whether the government profited from the tapes—leaving to another day the matters of (1) who did the taping and (2) whether the defense could show prejudice (R. 770, Tr. 3-4). According to the government, the defense had the burden of demonstrating intentional intrusion-plus-prejudice. *Id.* at 18-19. The trial court adopted that position. *Id.* at 20. The DOJ/OPR attorneys from Washington, DC advised the court that their goal was to complete the government's investigation *before November 1, 1991. Id.* at 30. The trial court stated that at whatever

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[4] The affiant, Barry Cauley, had been a chief law enforcement investigator for the government prior to opening an electronic surveillance company in Dallas, Texas. He had nineteen years of law enforcement experience in the area of electronic surveillance. *Inter alia*, his preliminary report surmised that at least two systems were installed for the surreptitious recording and noted that it was normal practice for trained law enforcement eavesdroppers to use two systems, one acting as a backup (R. 822 at ¶ 16(a); App. 35a-36a).

The public record in this case fails to include any contrary affidavit or information from the government.

point the defense wanted a "full blown" hearing, government (no-taint) affidavits could be challenged. *Id.* at 39.[5]

Petitioners protested that the trial court was rushing to judgment on a critical issue. Petitioners had been the subject of investigation for six or more years prior to indictment, yet the defense was given but two weeks to meet a single critical issue (Tr. 42). Finally, the trial court ruled that even if the taping occurred at the MCC, unless it could be pinned on individuals tied to the case who used or obtained the information, it was unimportant (Tr. 45).

(e) On September 25, 1991, the trial court filed a memorandum order denying petitioners' request to continue the trial date (R. 839; App. 20a-33a). While noting a split-in-circuits on the issue of prosecutorial intrusion, the trial court nonetheless ruled that the intrusion needed a direct nexus to the prosecutorial team. *Id.* Since the petitioners were not able to supply that linkage, no further inquiry was needed (App. 30a-33a). The trial court's reasoning included:

> Although the court has not heard the tape, for purposes of this motion, the court will deem counsels' representations sufficient to establish that the conversation was taped in the 19th floor conference room. However, even if the taping did occur at the MCC, that does not prove that the anyone from the prosecution team taped the defendants. *In other words, even if someone employed by the government did tape the defendants, it is not relevant to the instant case unless the government employee is an attorney or*

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[5] The government filed approximately forty affidavits. Each renounced any knowledge of any MCC eavesdropping.

agent assigned to his case or unless the contents of the tapes were communicated to an attorney or agent assigned to this case. (App. 30a; italicized emphasis added)

The trial court declined to resolve the question of whether the OPR report (due November 1) would be made available to the defense in support of its intentional governmental intrusion stance (Tr. 15).[6]

4. *Trial.*

On October 15, 1991, the MCC bugging issue unresolved, an anonymous jury was empaneled. The RICO conspiracy count included allegations that the petitioners conspired to commit two separate homicides. The indictment included substantive counts tracking those homicides. On March 10, 1992, the jury returned mixed homicidal verdicts against Infelise, DeLaurentis, Marino, and Bellavia.[7]

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[6] Petitioners DiDomenico and Nicholas were non-RICO coindictees charged with bookmaking. Originally released pending trial, their post-release conduct culminated in release revocation and remandment. As custodial pretrial detainees, they were directly exposed to the eavesdropping which is presented as an issue for review. DiDomenico, Nicholas and Aleman entered conditional guilty pleas, reserving the right to perpetuate their intrusional challenges.

[7] The RICO conspiracy count included predicate conspiratorial acts charging petitioner Infelise with conspiring to kill Robert Plummer (Pred.Act 8). Each petitioner was charged with conspiring to murder Hal Smith (Pred.Acts 17(a) and (b)). Identical substantive counts 8 and 9 charged the petitioners with conspiring to murder Hal Smith (tracking Pred.Acts 17(a), (b)). Infelise was acquitted of the Robert Plummer murder (Pred.Act 8) and found guilty of only one of the Smith homi-

(continued...)

5. *Post-Trial.*

(a) On March 13, 1992, the Chicago ABC television outlet aired an interview with an anonymous juror who stated that the jury had not convicted DeLaurentis of any homicide charge. During the week of March 16, 1992, the trial court recalled and questioned the anonymous jurors in the presence of counsel. On March 17, the foreperson of the jury (anonymous Juror #54) reported that the "check mark" showing that DeLaurentis had been convicted in the Hal Smith homicide was a mistake (Tr. of 3/17/92 at pp. 106-107). After the foreperson left the trial court's chambers (but remained immediately available), defense attorneys requested that the trial court ask the foreperson if she "could . . . have made a mistake elsewhere in the verdict forms." (*Id.* at p. 110). Upon government objection, the trial judge refused to ask the question. *Id.* at pp. 111-114.

On December 30, 1992, the trial court filed a memorandum order vacating the count eight conviction for petitioner DeLaurentis *vis-a-vis* the Hal Smith homicide (R. 1629, pp. 37-39). The same memorandum opinion noted

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[7] (...continued)
cide conspiratorial predicate acts (17(a)). The jury returned *no verdicts* on either Pred.Acts 17(b) or the identical substantive counts charging the same conspiratorial offenses. The jury exonerated DeLaurentis of conspiring to murder Hal Smith (P.A.'s 17(a) and (b)), but found him guilty of count 8 charging the same offense. The jury returned *no verdicts* against Marino on the conspiratorial predicate acts or the tracking substantive Hal Smith homicide counts (8 and 9). The jury returned a guilty verdict against Bellavia on Hal Smith P.A. 17(a), but no verdicts on P.A. 17(b) or the tracking substantive counts (8 and 9).

that the reason the trial court refused to inquire as to other verdict errors was *that there was no indication that there were any other errors* (R. 1629 at p. 38; Pet.'s emph.). In a subsequent memorandum order dated March 19, 1993, the trial court agreed that no questions were posed to the foreperson or any other juror regarding any other count (or defendant; R. 1331, p. 4, n. 3).

(b) *The DOJ Report.* During trial in February 1992, the trial judge advised petitioners that the DOJ/OPR investigation (originally promised for completion by November 1991) was still ongoing (R. 1236). Finally, in September 1992, the trial court filed an order noting that the DOJ Report would be filed under seal by September 11, 1992. Thereafter, the trial court would determine disclosure *vel non* (R. 1461).

On September 24, 1992 the trial court, again noting a split in circuits, filed a memorandum order denying an evidentiary hearing (R. 1482 at pp. 2-3; App. 50a-51a). Petitioners, the trial court reasoned, had not shown illegal taping involvement by the *prosecutorial team* and thus the government had no burden of explanation. *Id.* at pp. 5-6. That memorandum order noted that the OPR/DOJ investigation was still *incomplete and inconclusive*. *Id.* at 8. The trial court ruled that after the final report was received, the defendants could refile a motion for indictment dismissal. *Id.* at 8, n. 9.

The OPR final report was ultimately filed with the trial court on February 23, 1994. According to the trial court, the final report was "inconclusive" (R. 2009). Defense importunings for disclosure were denied and no hearing was ever held (R. 1856, 1862, 2029, 2032; App. 58a-59a).

6. *Sentencing*. Petitioners Infelise and Bellavia adopt and join in the petition for writ of certiorari filed, or to be filed, by co-indictee Louis Marino. Marino, Infelise and Bellavia are serving lengthy consecutive sentences. Petitioners Infelise and Bellavia raise the identical questions regarding the constitutionality of the consecutive sentences imposed by the same trial judge in the same case. Infelise and Bellavia's sentencing arguments would duplicate those to be presented by Marino. Thus, Infelise and Bellavia request permission to adopt Marino's sentencing argument as their sentencing arguments.

REASONS FOR GRANTING THE WRIT

The multiple issues present vexing questions impacting on Sixth Amendment jurisprudence.

1. (a) *The Sixth Amendment*. Petitioners have a clear Sixth Amendment guarantee to the effective assistance of counsel. That constitutional pledge compels communication between counsel and defendant. In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), the Court stated:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made *by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information*. (104 S.Ct. at 2066; italicized emphasis added).

In *Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477 (1985), the Court affirmed the granting of habeas relief

while reviewing an intentional post-indictment intrusion into the attorney-client privilege. The Court noted:

> Once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance. We have on several occasions been called upon to clarify the scope of the State's obligation in this regard, *and have made clear that, at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.* (106 S.Ct. at 484, 487; fn. 7 omitted; italicized emph. added)

The constitutional premise incorporates petitioners' rights to be free from prosecutorial intrusion into attorney-petitioner pretrial and trial preparation.

(b) *Circuit discord and burden shifting.*

The lack of circuit harmony is clear from Justice White's dissent from the denial of certiorari in *Cutillo v. Cinelli*, 485 U.S. 1037, 108 S.Ct. 1600-01 (1988). Justice White, joined by the Chief Justice and Justice O'Connor, dissenting from the denial of certiorari in *Cutillo*, advanced the need for review and clarification of circuit conflicts involving the Sixth Amendment and the question as to who bears the burden of persuasion, *viz.*, prejudice, 108 S.Ct. at 1601.

The split circuit was recently reviewed by the Tenth Circuit in *Shillinger v. Haworth*, 70 F.3d 1132, 1140-43 (10th Cir. 1995). In *Shillinger*, the court reviewed the granting of § 2254 relief where a local sheriff remained

with *Haworth* and his counsel during pretrial preparation. The local sheriff communicated some of what he heard to the local prosecutor, who subliminally utilized that information during *Haworth's* trial. The district court granted § 2254 relief. On appeal by the warden, the Tenth Circuit affirmed the granting of relief and remanded for a determination of what relief was appropriate (e.g., retrial or indictment dismissal). The Tenth Circuit noted that the Third Circuit ". . . has adopted the rule that intentional intrusions by the prosecution constitute *per se* violations of the Sixth Amendment," citing *United States v. Levy*, 577 F.2d 200, 210 (3rd Cir. 1978) and *United States v. Costanzo*, 740 F.2d 251, 254 (3rd Cir. 1984), cert. denied, 472 U.S. 1017 (1985). The Tenth Circuit opinion analyzed decisions from the Second and District of Columbia circuits which held that "prejudice may not be required when an intrusion is intentional, but have not specifically decided," citing *Briggs v. Goodwin*, 698 F.2d 486, 493, n. 22 (DC Cir. 1982); on rehearing, 712 F.2d 1444 (DC Cir. 1993), cert. denied, 464 U.S. 1040 (1984) and *United States v. Morales*, 635 F.2d 177, 179 (2nd Cir. 1980).[8] The First, Sixth and Ninth Circuits

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[8] In *Coplon v. United States*, 191 F.2d 749 (DC Cir. 1951), a divided panel vacated the denial of Rule 33 relief and remanded for plenary evidentiary hearings. Post-trial, Ms. Coplon alleged that she and her attorney had been the subject of telephonic wiretapping, both prior to and during her trial. The reversing panel, while directing post-trial hearings, noted that Sixth Amendment prejudice would be presumed, and a new trial ordered in the event she was able to sustain her claim that communications with her attorney had been the subject of interception. The panel referred to the Court's opinion in *Glasser v. United States*, 315 U.S. 60, 76, 62 S.Ct. 457 (1942),

(continued...)

have held that something beyond intentional intrusion itself is required to rise to the level of a Sixth Amendment violation, citing *United States v. Mastroianni*, 749 F.2d 900, 907 (1st Cir. 1984); *United States v. Steele*, 727 F.2d 580, 586 (6th Cir. 1984), cert. denied, 467 U.S. 1209 (1984); *United States v. Glover*, 596 F.2d 857, 863-4 (9th Cir. 1979), cert. denied, 444 U.S. 857 and 444 U.S. 860 (1979). The position of the Eighth Circuit was noted in *United States v. Davis*, 646 F.2d 1298, 1303 (8th Cir. 1981). In *Davis*, the panel analyzed prejudice *vel non*, stating:

> It is certainly true that where there is gross misconduct on the part of the government no prejudice need be shown. See *O'Brien v. United States*, *supra*, 386 U.S. at 345, 87 S.Ct. at 1158; *Black v. United States*, *supra*, 385 U.S. at 29, 87 S.Ct. at 192. (646 F.2d at 1303, n. 8)

In this case, the Seventh Circuit opinion noted that the defense could have (1) argued that no showing of prejudice was required or (2) presented some evidence of prejudice (App. 9a). Though the defense did not do the latter, it certainly did the former. On September 20, 1991, during one of the several pretrial skirmishes on the MCC bugging, one of the defense lawyers pointed out that if intrusion is intentional (flagrant), taint need not be shown (Tr. of 9/20/91 at pp. 14-16). Putting that remark in context, petitioners were clearly arguing that the in-

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[8] (...continued)
for the proposition that the right to have ". . . the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial . . . ," 191 F.2d at 759-60.

tentional intrusion by the government into the attorney-client relationship precluded a showing of prejudice—at least for the purpose of conducting an evidentiary hearing. Hence, the panel opinion is simply mistaken.

Petitioners' case conflicts with the District of Columbia, Third and Eighth Circuit positions, apparently falling within the First, Sixth and Ninth Circuits (intentional intrusion insufficient; App. 5a-9a).[9]

Apropos of the vexing burden of proof question, the Court's decision in *Murphy v. Waterfront Com'n of New York Harbor*, 378 U.S. 52, 84 S.Ct. 1594 (1964), provides insight. The Court wrote:

> Second, there are no real proof problems in this situation. *As in the analogous search and seizure and wiretap cases—where the burden of proof is on the Government once the defendant establishes the unlawful search or wiretap. . . .*

378 U.S. at 103, 84 S.Ct. at 1616 (italicized emphasis added; additional text omitted).[10]

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[9] In *United States v. Kelly*, 790 F.2d 130, 136-8 and n. 5 (DC Cir. 1986), the court vacated the denial of Rule 33 relief and remanded for further proceeding. The vacating panel included [now] Justice Scalia. The panel noted the clear lack of circuit symmetry surrounding the intentional-intrusion/Sixth Amendment questions as presented in this petition.

[10] In *Murphy*, Justice White cited to *United States v. Coplon*, 185 F.2d 629 (2nd Cir. 1950) and *United States v. Goldstein*, 120 F.2d 485, 488 (2nd Cir. 1941). In *Goldstein*, Circuit Judge Learned Hand established that in the area of wiretapping the burden of persuasion should remain with the government, 120 F.2d at 488.

Prior to *Murphy v. Waterfront Com'n of New York Harbor, ante*, the Court vacated federal criminal convictions where the government acknowledged intentional intrusions into the attorney-client relationship. As example, in *Black v. United States*, 385 U.S. 26, 87 S.Ct. 190 (1966), the Court vacated the denial of certiorari and remanded Black's case for a new trial. Black and his attorney had been overheard by the government in an unrelated investigation. The solicitor general advised the Court that nothing from that overhear related to Black's tax evasion case, and suggested that the conviction be vacated and remanded to the district court for an evidentiary hearing. The Court found otherwise:

> In view of these facts it appears that justice requires a new trial be held so as to afford the petitioner an opportunity to protect himself from the use of evidence that might be otherwise inadmissible.

87 S.Ct. at 191-2.[11]

In *O'Brien et al. v. United States*, 386 U.S. 345, 87 S.Ct. 1158 (1967), the Court granted *O'Brien* a new trial predicated on *Black*.[12] Again, Justices Harlan and Stewart dissented. Justice Harlan opposed the granting of a new trial while noting that none of the contents of the eavesdropping or wiretap were communicated to the attorneys for the Department of Justice, ". . . *including*

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[11] Justice Harlan's dissent suggested that remandment for an evidentiary hearing, and not the granting of a new trial, was the correct disposition, 87 S.Ct. at 192-3.

[12] Justice Harlan's dissent noted that none of the eavesdropping content was communicated to the government's prosecuting attorneys. Hence, a new trial was not required, 87 S.Ct. at 1158.

those who prosecuted this case . . .," 87 S.Ct. at 1158, emphasis added.[13/14]

In *United States v. Morrison*, 449 U.S. 361 (1981), the Court vacated the Sixth Circuit's indictment dismissal order, finding that the appellate remedy for a Sixth Amendment violation was *indecorous* under the circumstances. Justice White, for a unanimous Court, wrote:

> In *Black v. United States*, 385 U.S. 26, 87 S.Ct. 190, 17 L.Ed.2d 26 (1966), and *O'Brien v. United States*, 386 U.S. 345, 87 S.Ct. 1158, 18 L.Ed.2d 94 (1967), law enforcement officers improperly overheard pretrial conversations between a defendant and his lawyer. None of these deprivations, however, resulted in the dismissal of the indictment. Rather, the conviction in each case was reversed and the Government was free to proceed with a new trial.

101 S.Ct. at 668 (emphasis added).[15]

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[13] The government did not oppose remandment for an evidentiary hearing. Nonetheless, the Court ordered that *O'Brien* be tried anew.

[14] In *Kolod v. United States*, 390 U.S. 136, 88 S.Ct. 752 (1968), the Court found that conviction vacation and remand for an evidentiary hearing were required under circumstances where the government, *sub silentio*, acknowledged having eavesdropped on one of the petitioners. The government asserted that the information obtained was not arguably relevant to the prosecution, 88 S.Ct. at 753. The Court found the government's *ex parte* relevancy determination unavailing and remanded for an adversary hearing. In the ensemble, *Black*, *O'Brien* and *Kolod* direct that either a new trial or an evidentiary hearing be granted the petitioners.

[15] The panel cites *Morrison*, but fails to underscore its impact in the case at hand (App. 6a).

Recall that the petitioners are seeking an evidentiary hearing, not indictment dismissal. *Morrison* tells us that indictment dismissal may be inappropriate. Yet, the affirming panel disregards the teachings of *Black*, *O'Brien* and *Morrison*.

(c) *Precedent clearly reveals the error in failing to disclose to the petitioners the DOJ/OPR investigative report; in camera review cannot substitute for disclosure.*

On September 12, 1991, finding that the cassette tapes were made at the MCC, the trial court ordered temporary release for continued trial preparation (Tr. 9/12/91 at p. 15). On September 25, while denying an evidentiary hearing, the trial court again found that the tapes between petitioners and counsel emanated from the MCC (R. 839, p. 11). An eavesdropping expert reported that the taping was an inside job (App. 35a-45a). The Hon. Royce C. Lamberth, of the United States District Court for the District of Columbia, in a pending FOIA proceeding involving the DOJ/OPR "inconclusive" investigative report, found by clear circumstantial evidence that the government had impermissibly eavesdropped on the petitioners and their attorneys.[16]

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[16] The United States Court of Appeals for the District of Columbia has scheduled oral argument in *Tuite, et al. v. Henry, et al.*, No. 95-3575 for September 6, 1995. That appeal arises from an FOIA district court proceeding where counsel for the petitioners in this case brought a civil action against the Department of Justice for the eavesdropping which is the *sine qua non* of this issue. In *Tuite*, the district court found substantial circumstantial evidence indicating that the government had intentionally intruded on petitioners and their attorneys during the pretrial preparation at the federal MCC dur-

(continued...)

Notwithstanding antecedent factual findings (the tapings occurred between petitioners and counsel at the MCC) and a separate district court finding that the petitioners have demonstrated by clear circumstantial evidence that the taping was done by the government, the panel opined that perhaps the petitioners bore taping responsibility (App. 4a). The panel opinion adroitly shifted the focus from the government to the petitioners and away from the core issue. Musings such as: was it a visitor? was it a bribed federal employee? was it a member of the defense bar? was it a little yellow dog? have no foundation in record reality. The record is barren of *any evidence, from any source whatsoever*, that an MCC visitor, or a bribed federal employee, or even a member of the defense bar was capable of smuggling into and out of a level VI federal prison (highest security) a functioning tape recorder and tapes.[17]

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[16] (...continued)
ing 1990 and 1991. The district court, nonetheless, declined to make the OPR investigative report available to the plaintiffs in the concomitant civil action. The appellate proceedings question whether the district court erred in refusing to make the OPR report available for utilization in ongoing civil proceedings.

[17] The record below reveals that all Chicago-MCC visitors (including lawyers) are subjected to a plenary search. Any briefcase is x-rayed. Recording equipment is prohibited. All visitors pass through an enhancing magnetometer. Male visitors are required to remove trouser belts. It is virtually impossible for any visitor to smuggle anything into the Chicago-MCC.

The panel opinion, absent a scintilla of evidence, implies that the defense attorneys may have been responsible for the chicanery. In that regard, the panel opinion refers to *United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995), as emblematic of
(continued...)

Faced with conflicting fact questions and an "inconclusive" DOJ/OPR investigative report, the panel chose to affirm the district court's declination to disclose the DOJ/OPR report and conduct an evidentiary hearing.

A parallel case is *United States v. Coplon*, 185 F.2d 629 (2nd Cir. 1950). In *Coplon*, Circuit Judge Learned Hand authored a classic opinion reversing Ms. Coplon's espionage conviction following a jury trial. Prior to and during the trial proceedings, counsel for *Coplon* demanded an opportunity to inspect materials developed based on wiretaps between, *inter alia*, *Coplon* and her counsel. On appeal, *Coplon* asserted that her conviction was tainted because she was deprived of an opportunity to inspect some of the wiretapping materials which had been the subject of *in camera* disclosure to the trial judge. Circuit Judge L. Hand, for the reversing panel, wrote:

> However, the refusal to allow the defence to see them was, as we have said, a denial of their constitutional right, and we can see no significant distinction between introducing evidence against an accused which he is not allowed to see, and denying him the right to

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[17] (...continued)

the lack of security at the MCC during 1991. Chief Judge Posner, writing for the panel, neglects to tell the motivated reader that *Boyd*, along with *United States v. Burnside*, 824 F.Supp. 1215 (N.D. IL, 1993) and *United States v. Boyd*, 833 F.Supp. 1277 (N.D. IL, 1993), were decisions reviewing security lapses at the same Chicago-MCC where government informants (only) were allowed extraordinary privileges in exchange for prosecutorial testimony. In *United States v. Boyd*, 833 F.Supp. at 1357 the relationship between the MCC and the U.S. Attorney's Office in Chicago was described as "incestuous." In this case, the record is void of any evidence even hinting at evidence of defense attorney chicanery.

> put in evidence on his own behalf. *In the case at bar it may seem to have been a flimsy grievance to deny to Judith Coplon the opportunity to argue that these records did "lead," or might have "led," to her conviction; in truth it is extremely unlikely that she suffered the slightest handicap from the judge's refusal. But we cannot dispense with constitutional privileges because in a specific instance they may not in fact serve to protect any valid interest of their possessor. Back of this particular privilege lies a long chapter in the history of Anglo-American institutions. Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens.* (185 F.2d 629, 638; emphasis added.)

In *Alderman, et al. v. United States*, 394 U.S. 165, 89 S.Ct. 961 (1969), the Court vacated and remanded multiple conspiracy convictions where the primary question was whether wiretapping disclosures would be made to the defense. Disclosure had been denied below. Before the Court, the government conceded and agreed that for hearing purposes certain transcripts and recordings must be disclosed, 89 S.Ct. at 970. The Court was called upon to determine whether *in camera* review would suffice in connection with some of the materials which the government claimed was not subject to disclosure. The Court found *in camera* screening unavailing, stating:

> And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court to identify those records which might have contributed to the government's case.

89 S.Ct. at 971 (n. 14 omitted with inclusive authorities omitted).[18]

In addition to *Coplon* and *Alderman*, petitioners note that 18 U.S.C. § 2518(10)(a) allows petitioners (aggrieved persons) to seek pre- or post-trial hearings on issues involving impermissible interceptions. Similarly, 18 U.S.C. § 3504 allows a party aggrieved to seek suppression predicated, *inter alia*, on unlawful eavesdropping. Each statutory enactment calls for suppression if a hearing yields evidence of illegality. The statutes contemplate a "hearing."

During this term of Court, Justice Breyer filed a concurring opinion in *United States v. Armstrong*, ___ U.S. ___, 116 S.Ct. 1480, 1490 (1996). He explained that Fed. R.Crim.Proc., 16(a)(1)C) contemplates that a "defendant's defense" can take many forms and thus, compel the production of documents, including . . . (3) an unrelated claim of constitutional right . . ., 116 S.Ct. at 1490. Surely, the undisclosed "inconclusive" OPR/DOJ report was necessary for furtherance of the petitioners' claims regarding impermissible-intentional intrusion into the attorney-client privilege. Unifying the aforementioned enactments with Justice Breyer's concurring opinion in *Armstrong*, the declination to provide both disclosure and an evidentiary hearing remains clear error.

Most assuredly, had this petition been presented from the denial of petitioners' post-conviction petition pursuant to 28 U.S.C. § 2255 without an evidentiary hearing,

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[18] Justice White noted that the trial court could impose enforceable protective orders to guard against unwarranted disclosures, 89 S.Ct. at 973.

this Court's opinion in *Townsend v. Sain*, 372 U.S. 293, 313, 83 S.Ct. 745, 757 (1963) (overruled on other grounds, *Keeney v. Tam Ayo-Reyes*, 504 U.S. 1, 112 S.Ct. 1715 (1992)) would have required vacation and remand (". . . in other words a federal evidentiary hearing is required unless the state court trier of fact has *after a full hearing* reliably found the relevant facts.").[19]

At bar, petitioners were deprived of the opportunity to review (even under a protective order) the "inconclusive" DOJ/OPR investigative report. That report may have furthered petitioners' district court presentation to the point where the district court was satisfied that petitioners had hearing entitlements. Clearly, the case at hand conflicts with the Second Circuit decision in *United States v. Coplon* and this Court's decision in *Alderman, et al. v. United States, ante*.[20] Each petitioner is serving the func-

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[19] *Townsend's* counsel before the Court was George N. Leighton, Esq. Mr. Leighton eventually ascended to the United States District Court in Chicago. He retired from the United States District Court and returned to the private practice of law. As trial counsel for Louis Marino (separately petitioning for certiorari in this case), he was one of the attorneys visiting with petitioners at the MCC in Chicago during 1990 and 1991. He was also one of the recipients of the cassette tapes that are the *sine qua non* of this issue (App. 20a).

[20] The panel opinion affirming the declination to hold an evidentiary hearing fails to identify an appropriate standard of review. This Court's recent decision in *Ornelas v. United States*, ___ U.S. ___, 116 S.Ct. 1657, 1662 (1996), held that the prevailing Seventh Circuit "clear error" standard was not sustainable in light of this Court's and sister circuit precedent. The United States concurred that a *de novo* standard of review was applicable in Fourth Amendment cases, 116 S.Ct. at 1661, n. 4. The district court's declination to grant an evidentiary hearing considered and rejected Fourth Amendment plaints (App. 49a-50a; n. 1).

tional equivalent of life immurement, without parole. The time involved for an evidentiary hearing pales when contrasted with those sentences.

2. *Constitutionally mandated verdict unanimity.*

Verdict unanimity in federal criminal cases is constitutionally mandated. This edict admits of no compromise. In *Andres v. United States*, 333 U.S. 740, 68 S.Ct. 880 (1948), the court, while vacating a murder conviction, wrote:

> Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury.

68 S.Ct. at 884 (n. 13 omitted).

In *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 1637 (1972), Justice Powell, separately concurred, noting that Sixth Amendment verdict unanimity . . . is one of the indispensable features of [a] federal jury trial . . . 92 S.Ct. at 1637.

Verdict repristination for the purpose of accuracy or correctness is not proscribed. Indeed, the need for the verdict to conform to the jury vote is constitutionally compelled. Verdict unanimity can mean no less.

DeLaurentis, along with Infelise, Marino and Bellavia, had been charged with conspiring to murder a bookmaker, Hal Smith. The Hal Smith indictment counts included predicate acts 17(a) and (b) of count one (RICO conspiracy). Counts 8 and 9 were tracking substantive counts charging the same conspiratorial homicide. DeLaurentis was acquitted on counts 17(a) and (b) and count 9, but count 8 bore a guilty "check mark." Verdicts were re-

turned on March 11, 1992. Jurors returned for criminal forfeiture deliberations on March 12, 1992; they were discharged on March 12.

On Friday, the 13th of March, 1992 an anonymous juror reported to a branch of the local media that petitioner DeLaurentis had not been convicted of conspiring to murder Hal Smith. With celerity the trial court met with all counsel to order further jury inquiry. On March 17, 1992 the trial judge questioned the jury foreperson about the count 8 verdict. A portion of that colloquy includes:

> THE COURT: Um-hum. And so my question is then this guilty that's checked is a mistake?
>
> JUROR 54: Right. (Tr. 106-107)
>
> * * * * * *
>
> Were there additional verdict mistakes?
>
> * * * * * *

Defense counsel urged that the judge ask the foreperson *only that question*. No more. The government opposed the inquiry. The trial judge sided with the government. The foreperson was only asked about count 8 (Tr. 114-15).

There is substantial authority for the proposition that jurors are competent to testify that through mistake, the real verdict on which agreement was reached in the jury room was not correctly expressed in open court. *Young v. United States*, 163 F.2d 187, 189 (10th Cir.), cert. denied, 332 U.S. 770 (1947); *see also*, *McCullough v. Conrail*, 937 F.2d 1167, 1171 (6th Cir. 1991); *United States v. Stauffer*, 922 F.2d 508, 513-14 (9th Cir. 1990); *United States v. Dotson*, 817 F.2d 1127, 1130 (5th Cir. 1985); *Fox v. United States*, 417 F.2d 84, 89 (5th Cir. 1969).

In *United States v. Morris*, 612 F.2d 483 (10th Cir. 1979), the court vacated multiple federal gambling convictions while remanding for a new trial. During a jury polling it became clear that the foreperson of the jury was not satisfied, 612 F.2d at 487-88. Though the jury had returned verdicts as to four of the defendants, the foreperson declined to affirm the verdict as to the fifth defendant in open court. The trial court directed further deliberations. Upon returning to open court, a mistrial was declared for the fifth defendant. The foreperson sought to talk to the court, wanting to explain something. The judge allowed no further jury polling. On appeal, the convicted defendants asserted prejudicial collective error in the manner in which the trial court conducted the verdict proceedings. While reversing, the court stated:

> We start with the proposition that in a federal, criminal case the requirement of unanimity applies not only by reason of F.R.Crim.P., Rule 31(a), but also by reason of the Sixth Amendment. *Andres v. United States*, 333 U.S. 740, 748, 68 S.Ct. 880, 92 L.Ed.1055; *United States v. Gipson*, 553 F.2d 453, 456 (5th Cir.). It is a right so fundamental that it may not be waived. E.g., *United States v. Scalzitti*, 578 F.2d 507 (3rd Cir.). * * *
>
> *In any case upon the appearance of any uncertainty or contingency in a jury's verdict, it is the duty of the trial judge to resolve that doubt, for "[t]here is no verdict as long as there is any uncertainty or contingency to the finality of the jury's determination."* * * * In short, the trial court rejected all remedial measures. The jury was restricted so that it could not reconsider the verdicts as to these appellants when it was sent back to deliberate further, *repolling on the verdicts as to these appellants was refused* * * *, and mistrials

were denied to all of them. *Thus there was no safeguard used to protect the constitutional right of these appellants to valid, unanimous verdicts, despite the danger signal.* (612 F.2d at 488-90; parallel citations and ft.nts. omitted; our emphasis).

Once the foreperson disclosed the clear mistake on count 8, the verdicts were no longer certain, unqualified or unambiguous. A cloud loomed. Verdict veracity was at issue. Verdict ambiguity was a certainty. It was not as if the court was powerless. Within approximately ninety-six hours of the return of the forfeiture verdicts, the jurors were reassembled. The ambiguity and uncertainty became obvious. The defense only asked to inquire as to any other verdict errors or mistakes. The district court had both the opportunity and *responsibility* to remove the cloud from the verdicts. Given the major and irrefutable premise of verdict uncertainty and ambiguity, the Sixth Amendment's mandate of verdict unanimity compelled [other] verdict mistake inquiries. Juror #54 (the foreperson) left count 8 blank—as all the others (Tr. 9/17/92 at pp. 113-115).

So who marked DeLaurentis guilty on count eight? If not the foreperson—then an interloper? And what of Infelise and Bellavia? Which verdicts were the product of recordation error?

The district court unreasonably refused to inquire. The panel affirmation agreed, but noted, "the judge is permitted to inquire whether the verdict represents the actual decision of the jury" (App. 10a-11a). While agreeing with this undisputed principle, the affirming panel erroneously concludes that the petitioners asked the trial court to "cross the line" (App. 11a). The panel was referring to FRE 606(b) which precludes inquiry into the deliberative

process. The pristine transcript reveals the constitutional error. The petitioners had not urged the trial court to delve into the deliberative process. They asked to know only whether, once a serious mistake was revealed, were there any other recordation [verdict] mistakes? To deny the entreaty was the functional equivalent of foreclosing constitutionally-mandated inquiries into Sixth Amendment verdict unanimity. Surely, had there been a request for jury polling and trial court denial, trial anew would result, *United States v. Marinari*, 32 F.3d 1209, 1212-14 (7th Cir. 1994).

The failure of the trial court to probe the potential for additional verdict mistakes is without precedent. Verdict unanimity is one of the hallmarks of the Sixth Amendment. This Court must intercede. At the very least, the Infelise and Bellavia-Hal Smith guilty verdict must be set aside.

3. *Adoption of the sentencing issues, arguments and authorities presented, or to be presented, by Louis Marino.*

Petitioners Infelise and Bellavia received maximum consecutive sentences. Infelise, at age 71, was sentenced to sixty-three years in federal custody. Bellavia, age 60, was sentenced to twenty-five years in custody. The *sine qua non* for the maximum consecutive sentences (possibly proscribed by the Federal Sentencing Guidelines) was complicity in the Hal Smith homicide. Louis Marino similarly received a maximum consecutive sentence. Marino is filing a separate petition for writ of certiorari raising constitutional and statutory sentencing issues. Petitioners Infelise and Bellavia seek leave of the Court to adopt the Louis Marino issues and arguments as their own. Were they to include the sentencing issues in this cer-

tiorari petition, the Court would be confronted with wasteful duplications which would cost the Court needless expenditure of precious judicial time and resources in order to review duplicative issues—hence, this request for adoption.

CONCLUSION

The petition for certiorari should be granted.

Petitioners Infelise and Bellavia should be granted the opportunity to adopt the sentencing arguments presented, or to be presented, by Louis Marino in his separate petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 93-1134, 93-1135, 93-1136, 93-1604, 93-2008,
93-3434, 93-3435, 93-3513, 93-3514, 93-3515,
93-3516, 94-1831, 94-3341

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM DIDOMENICO, *et al.*,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 CR 87—**Ann Claire Williams**, *Judge.*

ARGUED OCTOBER 31, 1995—DECIDED MARCH 1, 1996

Before POSNER, *Chief Judge*, and CUDAHY and COFFEY, *Circuit Judges.*

POSNER, *Chief Judge.* The Chicago Outfit (the "Outfit," the "Mob," the "Mafia")—the criminal enterprise whose most notorious boss was Al Capone—operates through "street crews." The twenty defendants in this mainly RICO case that charges predicate acts of extortion, bribery, murder, and other offenses were members of the Ferriola Street Crew, named after its boss from 1979 to his death in 1989, Joseph Ferriola. Ferriola was succeeded by defendant Infelise. The Ferriola Street Crew engaged

in the usual "Mob" activities, in particular the protection racket (the collection of "street tax" from brothels, gambling enterprises, and other illegal businesses), loan sharking, and bookmaking, with bribery of police, judges, prosecutors, and other public officials, subornation of jurors, and the occasional murder thrown in to protect and enforce its reign of terror. The focus of the prosecution was on the street crew's efforts to collect street tax from "independent" bookmakers, which is to say bookmakers not affiliated with the "Mob," in the suburbs north of Chicago, primarily during the 1980s. These efforts included the murder of a bookmaker named Hal Smith. The evidence of the defendants' participation in these activities was overwhelming, except that the evidence of their participation in the murder depended critically on the testimony of a turncoat member of the street crew, William Jahoda. Smith had angrily refused a demand relayed to him from defendant DeLaurentis to pay street tax, saying "fuck the little guinea." Infelise directed Jahoda to lure Smith to Jahoda's home, which he did, arriving in Smith's car. Jahoda told Smith to enter the house through the garage, while Jahoda pretended to pick up his mail. Shortly afterward, through the open door to the kitchen, Jahoda saw Smith lying dazed but conscious on the kitchen floor. Infelise drove Jahoda back to the tavern where he had met Smith and told him to burn his clothes. When Jahoda returned home later that night, he found that the kitchen floor had recently been mopped up. Infelise called and told him to look for Smith's cigar and glasses, which the murderers thought they might have left there. Jahoda did not find the items. Smith's body was found a few days later in the trunk of his car. He had been tortured and then strangled.

The defendants were tried together and found guilty of most of the counts of the indictment and received long prison sentences which in the case of some of the defendants, given their age, are the equivalent of life in prison. Their appeals, which we have consolidated, present sixteen separate grounds. We shall confine our discussion to

those that have arguable merit, disregarding such frivolous ones as that the judge could not sentence the defendants to terms of years that were (because of the defendants' age) the practical equivalent of life in prison without a jury recommendation, as required by 18 U.S.C. § 34 as it read when they were sentenced. Section 34 applies only to convictions for crimes punished by the chapter of the federal criminal code in which the section appears (mainly arson resulting in the destruction of aircraft or motor vehicles), and none of the defendants was convicted of any such crimes. It didn't help, though, that in response the government, overlooking *United States v. Prevatte*, 66 F.3d 840, 843-44 (7th Cir. 1995), argued that a term of years, however long, and however old the defendants are, is not within the scope of section 34. We held the contrary in *Prevatte* and in *United States v. Martin*, 63 F.3d 1422, 1432-34 (7th Cir. 1995).

The most dramatic issue and the one pressed hardest by the defendants arises from the bugging of a room in the Metropolitan Correctional Center, the federal jail in Chicago. The room had been set aside for the use of the defendants, who were being detained in the jail awaiting trial, in meeting with their lawyers. Someone made a tape recording of a conversation between one of the defendants and his lawyer and sent the tape to the lawyer. The defendants argue that the district judge should have conducted an evidentiary hearing to determine the extent of the bugging and whether it had given the prosecution information about defense strategy that the prosecution had used to undermine the defense at trial.

The lawyer gave the tape to the government, which began an investigation to determine who had bugged the room. The FBI interviewed almost 150 people, including the defendants, their lawyers, the prosecutors, and employees of the jail. The report of the investigation, which was submitted in camera to the district judge (and which we have read as well), indicated that the investigation had been totally inconclusive. Although visitors to the MCC are supposed to be screened for tape recorders, security

was lax during 1991, when the bugging incident occurred, as we know from the El Rukns cases. See, e.g., *United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995). A tape recorder may have been smuggled in to one of the defendants by a visitor, or even carried in by one of the defendants' lawyers. A guard at the MCC might have been in the pay of the defendants (there was evidence at trial that at least one federal officer was in the pay of the Ferriola Street Crew) and made the tape in an effort to embarrass the prosecution. Or, as the defendants conjecture, the prosecution itself may have bugged the meeting room to find out what discreditable information the defendants knew about Jahoda, a key prosecution witness. Of course the prosecution would not have sent the tape of its illegal bugging to the lawyer for one of the defendants, but maybe an MCC guard sympathetic to the "Mob" found the tape and mailed it to the lawyer.

The government argues that the defendants did not lay a foundation for an evidentiary hearing on the matter because they presented no evidence that the bugging altered the result at trial—no evidence that the prosecution was privy to the bugging or, if it was, used the information gleaned from it to undermine the defense or if it did caused innocent people to be convicted of heinous crimes. We do not consider this a sound argument. It pushes the notion of harmless or nonprejudicial error too far. The principle that an acquittal or a new trial is not a proper remedy for governmental misconduct, that the defendant must show that the misconduct may have caused the jury to convict him, is sound but like most legal principles cannot be maintained without qualification. Otherwise the prosecution could send a defendant to prison without any judicial process whatsoever and if he complained defend by showing that had the defendant been tried with assistance of counsel and all the other trimmings of modern criminal procedure he would surely have been convicted and sentenced to a term of years at least as long as the prosecution proposes to hold him. The counterprinciple that defeats this result is that denial of the right to counsel (not the right to competent counsel, but the more basic

right to *some* counsel) or of any other fundamental rights of criminal defendants (such as the right to an impartial judge or to trial by jury) is reversible error even if not shown to be prejudicial—even if shown to be completely harmless. E.g., *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

We put to the government at oral argument the following example. The government adopts and announces a policy of taping *all* conversations between criminal defendants and their lawyers. It does not turn the tapes over to the prosecutors. It merely stores them in the National Archives. The government's lawyer took the position that none of the defendants could complain about such conduct because none could be harmed by it, provided the prosecutors never got their hands on the tapes. We are inclined to disagree, although for a reason that will become apparent shortly we need not attempt to resolve the issue definitively. The hypothetical practice that we have described would, because of its pervasiveness and publicity, greatly undermine the freedom of communication between defendants and their lawyers and with it the efficacy of the right to counsel, because knowledge that a permanent record was being made of the conversations between the defendants and their lawyers would make the defendants reluctant to make candid disclosures. (Totalitarian-style continuous surveillance must surely be a great inhibitor of communication.) And yet it would be impossible in any given case to show that the outcome had been changed by the practice. *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995); *United States v. Perry*, 857 F.2d 1346, 1349-50 (9th Cir. 1988). At the other extreme are cases of ad hoc governmental intrusion into the relation between a criminal defendant and his lawyer, falling far short of continuous surveillance. In such cases harm to the defense must be shown because the bare fact of the intrusion does not create a high probability that communication between lawyer and client or between client and lawyer was dis-

rupted. *United States v. Morrison*, 449 U.S. 361 (1981); *Weatherford v. Bursey*, 429 U.S. 545, 554 n. 4, 558 (1977); *United States v. Castor*, 937 F.2d 293, 297-98 (7th Cir. 1991); *Clark v. Wood*, 823 F.2d 1241, 1249-50 (8th Cir. 1987); *Sinclair v. Schriber*, 916 F.2d 1109, 1113 (6th Cir. 1990).

Our case may seem closer to the first pole than to the second. The bugging was discovered before the trial and from then on the defendants and their lawyers must have wondered whether their conversations were being overheard, even though the district judge promptly authorized the defendants to meet with counsel outside of the jail; and conceivably this fear might have prevented effective communication between client and lawyer, emptying the right to the assistance of counsel of much of its meaning. Cf. *United States v. Cronic*, 466 U.S. 648, 659-60 (1984); *United States v. Berkowitz*, 927 F.2d 1376, 1381 (7th Cir. 1991). "Free two way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful." *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978); see also *Geders v. United States*, 425 U.S. 80, 91 (1976). The defendants do not argue, however, that the effect of the natural anxiety of themselves and their lawyers concerning the confidentiality of their conversations was sufficient to warrant a new trial or perhaps—since it is not obvious how a new trial would dissipate the anxiety—even the dismissal of the indictments with prejudice. Such an argument would be unlikely to succeed when so far as appears the bugging incident was completely isolated (and isolated intrusions into the attorney-client relation are, as we have seen, not reversible error per se) and the bug may have been planted by one of the defendants. In any event the argument is not made. All the defendants argue for is an evidentiary hearing to get to the bottom of the matter. In light of the report of the FBI investigation it is unlikely that such a hearing would get us nearer to the heart of the mystery. But the defendants are understandably reluctant to defer to a report they

have not seen compiled by an agency that they suspect or at least affect to suspect of being responsible for the very crime that it was investigating.

The defendants' request is a reasonable one but it comes too late. The district judge offered them an evidentiary hearing, directed the government to furnish them with a list of all the employees of the MCC who had had access to the meeting room, and gave the defendants' lawyers subpoena power to compel the presence of witnessses at the hearing. The hearing was scheduled for September 23, 1991, a week before the scheduled opening of the trial. Shortly before the hearing was to take place, the defendants requested more time to complete their investigation. The hearing was repeatedly postponed at the defendants' request. During the delay the government submitted affidavits from all the members of the prosecution team, attesting their lack of complicity in the bugging. Finally on July 16, 1992, almost ten months after the original date set for the hearing and four months after the jury had returned its verdict, the defendants moved for an evidentiary hearing. After reviewing the FBI report, and noting that despite a lengthy investigation the defendants had come up with no evidence to suggest that the government was implicated in the bugging, the judge denied the motion. At no time during this entire period—which did not end until May 23, 1994, when the judge denied the defendants' last request for access to the FBI report—did the defendants submit the tape to the judge.

In these circumstances we cannot say that the judge abused her discretion in declining to order an evidentiary hearing. A critical consideration is the government's affidavits. Although evidentiary hearings in criminal cases are not governed by the Federal Rules of Civil Procedure, the provisions of those rules relating to summary judgment are applicable by analogy. *United States v. Ritter*, 752 F.2d 435, 439 (9th Cir. 1985); cf. *United States v. Randle*, 966 F.2d 1209, 1212 (7th Cir. 1992); *Castillo v. United States*, 34 F.3d 443, 445-46 (7th Cir. 1994). In opposing the evidentiary hearing sought by the defendants the gov-

ernment was in a position analogous to that of a movant for summary judgment who argues that no genuine issue of material fact exists and therefore that summary judgment should be granted. A fundamental principle of summary judgment that we think ought to be applied in cases such as this in which the issue is whether to hold an evidentiary hearing is that if the proponent supports his motion with affidavits, the opponent must counter the motion with his own affidavits (or equivalent materials, which is to say materials having the quality of evidence). By submitting affidavits the government shifted to the defendants the burden of submitting counteraffidavits that would show there was an issue that only an evidentiary hearing could resolve. The defendants did not take up the burden although they had many months to do so.

Against this it can be argued, in accordance with our earlier discussion, that even if the prosecution team was not complicit in the bugging, the defendants' right to counsel may have been infringed. It is one federal government after all. If the director of the MCC ordered the bugging, there would be a serious issue of the infringement of that right even if the fruits of the bugging were not turned over to the prosecutors. And on that issue the affidavits did not bear at all. But throughout these proceedings, up to and including the appeal, the defendants have accepted that they must show, if not prejudice to their defense, if not likelihood of acquittal had the bugging not taken place, at least potential prejudice and for that they would have to show that the prosecution received, directly or indirectly, valuable information from the bugging. This the prosecution denied by affidavit—denied that it had received *any* information from the bugging—and the inability of the defendants, though granted ample time and resources, to come up with counteraffidavits dooms their challenge to the denial of an evidentiary hearing. Had the defendants not sought to postpone the hearing first offered them by the district judge, they would have had their hearing. They gambled on having a better hearing if given more time to investigate, but the gamble failed when the

investigation turned up nothing, and they must be held to their tactical decision.

In short, the defense could have (1) argued that no showing of prejudice was required or (2) presented some evidence of prejudice. By doing neither, the defense forfeited their claim to an evidentiary hearing. We do not think that we are being overtechnical in so concluding, especially since, given the inconclusiveness of the FBI's investigation, the likelihood that an evidentiary hearing would get to the bottom of the bugging incident is remote.

The defendants raise two issues concerning the jury. The first is whether the judge abused her discretion in empaneling an anonymous jury, that is, in refusing to reveal the names and addresses of the jurors to the parties. A juror's name and address are information potentially valuable to a party in deciding whether to challenge a juror either for cause or by the use of a peremptory challenge. The juror might turn out to be related to a party or a witness (yet not disclose this on voir dire) or to live in a neighborhood whose residents have demographic characteristics predictive of their likely response to the issues in the case. There is skepticism in some quarters about the ability of lawyers, even when aided by pricey consultants, to pick favorable jurors; but so long as we have challenges for cause and peremptory challenges the objection to anonymous jurors that it deprives the lawyers of information essential to their exercise of a valued procedural right cannot be rated as negligible. But we think the district judge acted within her discretion (see *United States v. Crockett*, 979 F.2d 1204, 1215 (7th Cir. 1992); *United States v. Paccione*, 949 F.2d 1183, 1192 (2d Cir. 1991)) in deeming the right overridden in this case by the fear of jurors to be identified to the Chicago Outfit and by the danger that they might be bribed. Intimidation in general, and bribery of public officers connected with the criminal justice system (and jurors of course are ad hoc public officers of that system—are in fact lay judges) in particular, are specialties of the Outfit. This is not a case, like *United States v. Vario*, 943

F.2d 236, 241 (2d Cir. 1991), in which the defendants are rumored to have "Mob" connections. The defendants *are* the "Mob." We add that the anonymity of the jury hurt the prosecution as well as the defense, since the prosecution too has and frequently exercises the right to challenge jurors for cause or to exercise peremptory challenges. The judge's ruling may not have altered the balance of advantages between prosecution and defense.

The other jury issue relates to an inconsistency in the verdict regarding defendant DeLaurentis. He was accused of participation in the conspiracy to murder the bookmaker Hal Smith in two different counts of the indictment. The jury found him not guilty of that participation in one of the counts (Count One) but guilty in the other (Count Eight). The poll of the jury did not illuminate the discrepancy, as each juror indicated that the verdict was correct. On the day after the verdict was rendered, however, one of the jurors stated on a local news program that the jury had *not* voted DeLaurentis guilty of conspiracy to murder in Count Eight. This led the judge to interview the jurors, a week later, in the presence of counsel. The judge ascertained that the jury had indeed intended to acquit DeLaurentis of both counts of conspiracy to commit murder. But she refused the defendants' request that she ask the jurors whether they had made any other mistakes in filling in the verdict form.

Again we think the judge acted within the scope of her discretionary authority. There was no indication of any other mistake in the verdict. The interviews took place a week after the verdict and the jurors no longer had their notes of what had gone on in the jury room. It is not clear what line of questioning might have identified another error on the verdict form. Although not permitted to inquire into the deliberative process itself—the discussion or thoughts or votes of the jurors, Fed. R. Evid. 606(b)—the judge is permitted to inquire whether the verdict represents the actual decision of the jury. *Continental Casualty Co. v. Howard*, 775 F.2d 876, 885 (7th Cir. 1985); *Plummer v. Springfield Terminal Ry.*, 5 F.3d 1

(1st Cir. 1993). But this right of inquiry must be conducted with due regard for the policy that underlies Rule 606(b). Jurors are conscripts, taken away from their jobs or other activities sometimes for months at a time (the trial in this case lasted four and a half months) and enlisted in the justice system for meager pay, here to try dangerous men who are members of a gang capable of retaliation against jurors. To embarrass or harass these jurors by protracted questioning about their deliberations would be a disservice to the jury system, which can hardly thrive if jurors are sullen and resentful as a result of being abused by judges and lawyers. The line is drawn between determining whether the verdict is true in the sense of an accurate statement of the jury's decision and rational in the sense of intelligent and deliberated. *Id.* at 4; *Continental Casualty Co. v. Howard*, *supra*, 775 F.2d at 885-86; *Karl v. Burlington Northern R.R.*, 880 F.2d 68, 74 (8th Cir. 1989). The defendants ask us to cross the line. There was no reason to believe that the verdict contained other clerical errors. A march through the verdict in search of them would inevitably have become an inquest on the character of their deliberations.

The two jury issues raised by the defendants thus turn out to be linked by their common potential for imperiling the jury system by undermining the protection of jurors from threats to their safety and dignity.

There is an issue relating to the instructions. After the trial in this case the Supreme Court, in *United States v. Gaudin*, 115 S. Ct. 2310 (1995), held that the issue of materiality, in a prosecution under 18 U.S.C. § 1001 for making false statements to federal agencies, is one of fact, not law, and is therefore for the jury to determine. In our case the judge said to the jury, with respect to the charges of violations of the Internal Revenue Code made in the indictment against several of the defendants, "I instruct you as a matter of law that understatement of 'total income' is a material matter." The provisions of the Internal Revenue Code under which these defendants were charged, however, 26 U.S.C. §§ 7206(1) and (2),

punish false or fraudulent statements with respect to *material* facts, thus bringing the principle of *Gaudin* into play. These defendants would therefore be entitled to a new trial on the tax counts had they raised the issue in the district court. Since they did not, they can prevail only if the error in the instructions was a plain error, and for the reasons stated in the concurring opinion in *Gaudin*, 115 S. Ct. at 2322, and in our recent opinion in *United States v. Ross*, No. 92-1449, slip op. at 12-17 (7th Cir. Feb. 2, 1996), we believe that it was not.

Jahoda testified to a number of conversations that he had had with defendant Bellavia in 1989, concerning the murder of Smith five years earlier. For example, in a plain allusion to the murder, Bellavia told Jahoda, "You know, when them things happen, I just, when they're done, they're done. . . . I blank 'em out. . . . Sometimes you got to get it out in the open and you feel better, and you can put it to bed once and for all. You know, it's done and gone, forget about it." In the same vein he told Jahoda, "Forget about it. You know, it's gone. . . . [Y]ou never do something with . . . anybody you're going to worry about in the future. Forget about it. You know, it's gone. The day it was over, it was over. It's forgotten. That was the end of it." These statements, though hearsay, were admitted into evidence against the other defendants as having been made in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E). Against Bellavia himself, they were uncontroversially admissible as the admissions of a party. Fed. R. Evid. 801(d)(2)(A). But the principle that allows the admission of conspirator X to be treated as the admission of defendant conspirator Y, usable against Y as the admission of a party provided that the statement is made in furtherance of the conspiracy, disquiets those who believe that the concept of conspiracy gives prosecutors too much power. The rationalization for the principle is that conspirators are each others' agents (and therefore principals), and the principal is bound by the agent's words and deeds, provided they are within the scope of the agency, so that an admission by one is

an admission by all and can be used against all as "their" admission.

This translation of commercial principles of agency into the law of evidence is one of the less impressive examples of what Coke called the "artificial reason" of the law. The concern behind the hearsay principle is with the reliability of evidence rather than with the facilitation of enterprise—and anyway the law of conspiracy is designed to discourage rather than to facilitate enterprise. Because a statement to be admissible as the statement of a party need not have been against interest when made (or at any time for that matter), *Huff v. White Motor Corp.*, 609 F.2d 286, 292 and n. 7 (7th Cir. 1979); 2 *McCormick on Evidence* § 254, p. 143 (4th ed., John William Strong gen'l editor, 1992), the admissibility of such a statement cannot convincingly be grounded in the presumed trustworthiness of a statement that is against the utterer's self-interest to give. E.g., 2 *id.*, p. 141; *United States v. Pallais*, 921 F.2d 684, 687-88 (7th Cir. 1990). The standard justification of its admissibility is a kind of estoppel or waiver theory, that a party should be entitled to rely on his opponent's statements. E.g., *United States v. Chappell*, 698 F.2d 308, 312 (7th Cir. 1983); 2 *McCormick on Evidence*, *supra*, p. 141. It has, it seems to us, rather little force as applied to the admissibility of coconspirator's statement. *United States v. Gil*, 604 F.2d 546, 549 (7th Cir. 1979); Comment, "Reason and the Rules: Personal Knowledge and Coconspirator Hearsay," 135 *U. Pa. L. Rev.* 1265, 1272-73 (1987). About all that can be said in favor of the rule is that since the statements of agents of legitimate enterprises are imputed to the enterprise through the operation of the law of agency on the party-admission rule, illegitimate enterprises, such as criminal conspiracies, should not receive more favorable treatment.

Whatever the justification for the rule—and there may be none—its dependence on agency principles makes the scope of the conspiracy critical. And a conspiracy, and a conspiracy to conceal an earlier, completed conspiracy, are two different conspiracies, like two different firms, and

statements made in furtherance of the second, the cover-up conspiracy, are therefore not admissible in evidence to demonstrate participation in or the acts of the first conspiracy. *Krulewitch v. United States*, 336 U.S. 440, 443-44 (1949); *United States v. Masters*, 924 F.2d 1362, 1368 (7th Cir. 1991); *United States v. Xheka*, 704 F.2d 974, 985 (7th Cir. 1983). But this is not such a case. Hal Smith was killed as part of the overall conspiracy to extract street tax from the independent bookmakers in the area worked by the street crew. The conspiracy was still going on when Bellavia, in an effort to prevent its unraveling, made his reassuring statements to Jahoda. Statements designed to prevent a conspiracy from collapsing are not to be equated to statements designed to cover up a finished conspiracy. In the first case unlike the second there is only one conspiracy; the statements are made in an effort to shore it up and keep it going; they are therefore admissible against the conspirators. *United States v. Marin*, 7 F.3d 679, 690 (7th Cir. 1993); *Garlington v. O'Leary*, 879 F.2d 277, 284 (7th Cir. 1989); *United States v. Mason*, 658 F.2d 1263, 1270 (9th Cir. 1981).

The remaining issues that require discussion all relate to sentencing. Defendants Bellavia, Infelise, and Marino object vigorously to the fact that the judge in determining their sentences found that their conduct had included a conspiracy (nested within the overall RICO conspiracy) to murder Hal Smith, even though the jury either acquitted or hung on the counts that charged these defendants with participation in that conspiracy. The issue of their participation was before the jury, they argue, and in finding guilt where the jury did not the judge usurped the jury's function. This is wrong. The jury was asked to decide whether there was proof of the defendants' guilt beyond a reasonable doubt, whereas the issue in sentencing is whether the defendants' guilt is shown by a preponderance of the evidence, a lower standard, so that the failure of the proof to satisfy the first standard doesn't show that it fails to satisfy the second. *United States v. Jones*, 54 F.3d 1285, 1294 (7th Cir. 1995); *United States*

v. Chandler, 12 F.3d 1427, 1434-35 (7th Cir. 1994). Otherwise you couldn't have a tort suit for wrongful death as the sequel of the defendant's acquittal, which of course you can.

We acknowledge the growing concern that defendants in the federal courts are being sentenced for crimes that they were adjudged guilty of only under the civil standard. *United States v. Ebbole*, 917 F.2d 1495, 1496 (7th Cir. 1990). The government could not persuade the jury to convict these three defendants of conspiracy to murder Hal Smith but they were sentenced for the crime anyway. The principle exploits the traditional indifference of reviewing courts to the length of a sentence within the bounds fixed by the statute under which the defendant was convicted. Although two members of this court have recently expressed tentative support for requiring, as a matter of the federal common law of criminal procedure, proof by clear and convincing evidence of facts presented at the sentencing hearing in justification of a markedly higher sentence than the facts found at trial, *United States v. Rodriguez*, No. 94-2080, slip op. at 3 (7th Cir. Jan. 4, 1996) (dissent from denial of rehearing en banc), that is neither the present view of a majority of the judges nor a position urged by the defendants in this case.

DeLaurentis was sentenced to 222 months in prison, although his base offense level after various adjustments other than the one in issue was only 33, for which the guidelines range is 135 to 168 months. The judge raised the sentence far above that range by making an upward departure on the basis of the large number of crimes committed by DeLaurentis that had been counted neither in the base offense level nor in his criminal history (he had, in fact, no significant criminal history). The reason for the departure was that the base offense level is "topped off" at five "units" (which in this case equates to crimes). U.S.S.G. § 3D1.4; *United States v. Dawson*, 1 F.3d 457, 459 n. 2 (7th Cir. 1993). DeLaurentis had actually committed at least 22 crimes, of which 6 would get him to the 5-unit top. Since all 22 crimes were committed in furtherance of the RICO conspiracy, they were conduct re-

lated to the offense of conviction rather than (as in *United States v. Dawson*) being a part of the defendant's criminal history. Judge Williams divided the number of uncounted crimes by 5 in order to yield additional base levels, resulting in the punishment bonus of which the defendant complains. We do not understand the defendant to be arguing that the divisor was too small. The choice of the divisor is an exercise of judgment that an appellate court will not disturb unless it exceeds the bounds of reason. *United States v. Chase*, 894 F.2d 488, 491-92 (1st Cir. 1990); but cf. *United States v. Pearson*, 911 F.2d 186, 190-91 (9th Cir. 1990).

The argument, rather, is that the grouping provision (section 3D1.4) is limited to convicted crimes (or to stipulations of crimes). U.S.S.G. ch. 3, pt. D, introductory comment; *United States v. Dawson, supra*, 1 F.3d at 463; *United States v. White*, 888 F.2d 490, 496 (7th Cir. 1989); *United States v. Paccione*, 949 F.2d 1183, 1205 (2d Cir. 1991); *United States v. Blanco*, 888 F.2d 907, 909-10 (1st Cir. 1989). Unconvicted, unstipulated crimes may not be used for a departure based on that section. *United States v. Dawson, supra*, 1 F.3d at 463. Only 13 of DeLaurentis's 22 crimes were ones of which he had been convicted. So his punishment bonus under section 3D1.4 should have been only 2 at most ($13 - 6 = 7$, $7 \div 4 = 2$), rather than the 3 that the judge gave him. There may be other grounds for an upward departure, see U.S.S.G. § 5K2.0; *United States v. Dawson, supra*, 1 F.3d at 465; *United States v. Uccio*, 940 F.2d 753, 759 (2d Cir. 1991), but that is something for Judge Williams to consider when resentencing DeLaurentis.

The last issue we need discuss concerns the denial of defendant Sarno's motion to vacate his plea agreement on the ground that the district judge gave him a much heavier sentence than the agreement contemplated. The agreement specified a guidelines range of 46 to 57 months and in fact he was sentenced to 78 months. But there was no violation of the agreement, which stated that the guideline calculations in it "are preliminary in nature and sub-

ject to revision by the Court." The calculations turned out to be in error and were corrected by the judge. Sarno explicitly assumed the risk of such an error, and has only himself or possibly his lawyer to blame. He could have refused to sign the plea agreement unless it specified that it could be rescinded if the judge went outside the guidelines range set forth in it. Fed. R. Crim. P. 11(e)(1)(C), (e)(4); *Carnine v. United States*, 974 F.2d 924, 930-31 and n. 8 (7th Cir. 1992); *United States v. Ellison*, 798 F.2d 1102, 1105 (7th Cir. 1986).

DeLaurentis is entitled to be resentenced. With this exception, the judgments are affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: March 1, 1996

BEFORE:

Honorable Richard A. Posner, Chief Judge
Honorable Richard D. Cudahy, Circuit Judge
Honorable John L. Coffey, Circuit Judge

Nos. 93-1134, 93-1135, 93-1136, 93-1604, 93-2008, 93-3434, 93-3435, 93-3513, 93-3514, 93-3515, 93-3516, 94-1831, 94-3341

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

WILLIAM DIDOMENICO, also known as BILLY D; HARRY ALEMAN, PAUL SPANO, et al.,

Defendants-Appellants

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 90 CR 87, Ann Claire Williams, Judge

The judgment of the District Court is AFFIRMED, with the exception of Defendant DeLaurentis who is entitled to be resentenced, in accordance with the decision of this court entered on this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 23, 1996

Before

Hon. Richard A. Posner, Chief Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. John L. Coffey, Circuit Judge

Nos. 93-1134, 93-1135, 93-1136, 93-1604, 93-2008, 93-3434, 93-3435, 93-3513, 93-3514, 93-3515, 93-3516, 94-1831, 94-3341

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM DIDOMENICO, et al.,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 CR 87, Ann Claire Williams, Judge.

ORDER

Petitions for rehearing and suggestions for rehearing en banc have been filed on behalf of all appellants, followed by the filing of a petition for rehearing by the appellee. All the judges on the original panel have voted to deny the petitions, and none of the active judges has requested a vote on the suggestions for rehearing en banc. The petitions are therefore DENIED.

[Dated September 25, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

v. Case No. 90 CR 87
[R. 839]

ROCCO INFELISE, et al.

MEMORANDUM OPINION AND ORDER

Several weeks ago copies of a cassette tape recording containing privileged conversations were delivered to the attorneys for defendants Marino, DiDomenico and Sarno by unidentified sources. The defendants maintain that this tape was recorded while certain defendants, who are being detained pending trial, were meeting with their attorneys in their trial preparation room on the 19th floor of the Metropolitan Correctional Center ("MCC"). The defendants now move to postpone the trial until it is determined who did the taping. For the following reasons, defendants' motion to postpone the trial date is denied.

Background

During the week of August 26, 1991, George Leighton, Robert Stevenson and Anthony Onesto, attorneys for defendants Marino, Sarno and DiDomenico respectively, received copies of a tape recording from unidentified sources. According to defense counsel, the tape was recorded in a room on the 19th floor of the Metropolitan

Correctional Center ("MCC") where the attorneys and the detained defendants were allowed to meet to prepare for trial. Defense counsel further submit that the tape contains privileged conversations between some attorneys and their clients about this case. After the aforementioned defense attorneys received copies of the tape, they notified the Chief Judges of the District Court and the Court of Appeals for the Seventh Circuit, as well as the U.S. Attorney for the Northern District of Illinois. On August 29, 1991, the room on the 19th floor of the MCC was sealed and the U.S. Attorney's office for the Northern District of Illinois, in conjunction with the Justice Department's Office of Professional Responsibility ("OPR"), began an investigation to determine who made the tape recording at issue. The defendants also began their own independent investigation.

On September 5, 1991, the defendants presented a motion to this court requesting the court to vacate the September 30, 1991 trial date pending the conclusion of the investigations into who perpetrated the taping. Defendants argued that it would be unfair to hold them to the trial date given that they could no longer use the room on the 19th floor to prepare for trial. The court then asked for a report on the progress of the government's investigation into this matter from Assistant U.S. Attorneys Dan Gillogly and Mark Rotert, who were assigned to work on the investigation with the O.P.R. Mr. Gillogly first stated that he and Mr. Rotert had set up a Chinese Wall between themselves and the A.U.S.A.'s prosecuting the Infelise case, so that no information regarding the investigation would be revealed to the Infelise prosecutors. Mr. Gillogly then stated that although the technical sweep of the room would be com-

pleted later that day, he could not even estimate how long the entire investigation would take. Based upon the fact that defendants had been unable to meet with their attorneys for a week, the court vacated the jury selection date of September 23, 1991. However, because no evidence of wrongdoing by the prosecutors or agents assigned to this case had been presented, the court reset the date of jury selection to October 1, 1991. The court also set another status hearing for September 12, 1991.

At the September 12 status hearing the court received a further update on the progress of the government's investigation from Mr. Gillogly.[1] He reported that the government was continuing its technical investigation and was also conducting interviews of the attorneys, agents and defendants involved in this case. Mr. Gillogly estimated that the government's investigation would be completed in 35-40 days. The defendants estimated that they needed the same amount of time to complete their investigation.

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[1] On September 11, 1991, defendants Sarno and Salerno filed a motion requesting, among other things, that the court appoint a special prosecutor, who is not connected to the U.S. Attorney's Office for the Northern District of Illinois, to conduct the investigation in lieu of Mr. Gillogly and Mr. Rotert. On September 17, 1991, the government filed a response in which the government demonstrated that the defendants' motion for a special prosecutor lacks a sound legal basis. Nevertheless, in order to prevent any public perception that the investigation is not being handled fairly, the government requested that members of the Office of Professional Responsibility assume total responsibility for the completion of the investigation. Thus, as of September 17, 1991, Mr. Gillogly and Mr. Rotert withdrew from the investigation. Having received no objection from defense counsel regarding this procedure, the court holds that defendants' motion for the appointment of a special prosecutor is moot.

After hearing brief argument on the necessity of postponing the trial until after the completion of the investigations, the court determined that the only question that needed to be decided before trial was whether the government attorneys or agents *involved in this case* had participated in or benefitted in any way from the taping of defense counsel and their clients. The court decided that the best way to proceed was to have a hearing on Monday, September 23, 1991, to determine if government attorneys or agents involved in the infelise case were tainted in any way by the tape recording. If, after the hearing, the court determined that no government attorneys or agents assigned to this case were tainted, the trial would proceed. The court explicitly stated that this procedure would in no way preclude defendants from having another hearing on the issue of taint after the completion of the investigations, if a further hearing was needed. The court also stated that it would entertain any motions to dismiss or suppress that defendants wanted to bring based on the results of the investigations. In short, the court intended to use the September 23 "taint hearing" as an initial inquiry before proceeding to trial. The court fully intended to adjourn the trial for further hearings if and when any further hearings became necessary.[2]

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[2] The court notes that because defendants refused to meet with their attorneys in the 19th floor conference room of the MCC, the court ordered that the defendants be brought to their attorneys' offices eight hours per day, five days per week to prepare for trial. Defense counsel and government counsel drafted an agreed order under which the U.S. Marshals' service transports the defendants from the MCC to their attorneys' offices according to a set schedule. *See* Order dated September 13, 1991.

On September 20, 1991, defendants filed a motion to "Adjourn the September 23, 1991 Suppression Hearing Date." In their motion, defendants indicated that they did not want to have a separate "taint hearing" before the completion of the pending investigations into who did the taping, presumably because defendants believe that the findings of these investigations will impact on the issue of government taint. The Assistant U.S. Attorney who was assigned to represent the *Infelise* prosecutors at the "taint hearing," Mr. Barry Elden, offered to submit affidavits from the prosecutors and case agents regarding whether they were involved in or profited from the taping in any way. Mr. Elden suggested that the court could proceed to trial with the affidavits, and then adjourn the trial if and when the defendants were ready to go forward with a comprehensive hearing. The defendants countered that the court must postpone the trial date until the investigations into the MCC taping are complete and the court can hold a full hearing regarding this issue. The defendants argued that postponing the trial was necessary from both a legal and a practical standpoint. The court will now address each of defendants' arguments regarding the necessity of postponing the trial.

Government's Right to Appeal

Surprisingly, defendants first argue that the court must postpone the trial until after the investigations are complete and a hearing is held in order to preserve the government's right to appeal. Defendants point out that if the court empanels a jury and starts the trial, and then dismisses the indictment mid-trial, jeopardy will have attached. Thus, even if the government successfully

appealed the indictment dismissal, the victory would be a hollow one since the government would not be able to re-indict defendants on the same charges. The government addressed this issue at the September 20 status hearing and stated that the government is aware of this risk and is willing to assume such a risk and go to trial. Thus, because the government is the only party which can assert this argument, and it has chosen not to do so, the argument is moot.

Use of Theme of Improper or outrageous Government Conduct

Defendants next argue that the trial must be adjourned pending resolution of the question of who tape-recorded defendants and their attorneys because if it turns out that there is some evidence of government involvement in the taping, but not enough evidence to warrant indictment dismissal, defendants want to question potential jurors regarding their feelings about illegal electronic surveillance by the government. Moreover, defendants contend that they would want to use the theme of government misconduct during their opening statements. Defendants would also want to ask any government agents who testify about their involvement in the taping in order to establish bias of a particular witness.[3]

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[3] The court notes that this argument in support of postponing the trial was not included in any written submission, and instead was advanced by defense counsel at the September 20 status hearing. Thus, defendants have provided no case law in support of this argument.

The court finds that the aforementioned considerations do not warrant postponing the trial at this point. For example, the court understands that defendants want potential jurors questioned about their feelings regarding illegal government taping, if in fact illegal taping occurred in this case. However, defendants' inability to have the court ask questions regarding this issue will not interfere with defendants' right to choose a fair and impartial jury. The court intends to conduct a thorough voir dire which will give defendants a more than adequate foundation upon which to base their challenges. As the First Circuit stated in *Schlinsky v. United States*, 379 F.2d 735, 738 (1st Cir. 1967), "the purpose of voir dire is to ascertain disqualifications, not to afford individual analysis in depth to permit a party to choose a jury that fits into sore mold that he believes appropriate for his case."

Similarly, the court finds that defendants will not be deprived of any fundamental rights if their attorneys are prohibited from discussing the taping issue in their opening statements. Courts routinely prohibit attorneys from discussing various topics in their opening statements for a variety of reasons, one of the most common being the lack of a sufficient factual basis. Furthermore, given that the trial is scheduled to last four to five months, there will be ample opportunity to discuss this theme during cross-examination of government witnesses, during the defense case and during closing arguments if the investigations produce any evidence of government involvement.

On a similar note, defendants argued that if they found out about a certain agent's involvement in the taping after he has been cross-examined, it would not be adequate to re-call him to inquire about his involvement in

the taping later in the trial. In support of this argument, defense counsel stated that there are studies which show that once jurors hear something, such as damaging direct testimony, it stays with them, unless it is challenged. However, defense counsel failed to give the court any specific citations to these studies. But even if there is a study that stands for such a broad proposition, the court is inclined to believe that the effectiveness of a certain line of cross-examination is not solely dependent upon when it is presented to the jury. If the content of cross-examination is sufficiently damaging, it is likely to have an impact upon the jurors no matter when it is presented.

Pendency of Plea Negotiations

The defendants next argue that the court should postpone the trial until the issue of who taped the defendants is resolved because, before the issue arose, some defendants were engaged in plea negotiations, and now such discussions have ceased. *See* Defendant Spano's Motion to Revisit the Question of Severance at 4. However, the court questioned the attorneys about this issue at the September 20 status hearing and was informed that the parties were attempting to work out language for conditional plea agreements which would preserve defendants' right to attempt to withdraw their pleas it the current investigations reveal any government misconduct. Thus, the court finds no evidence at this point that a decision to go forward with the trial, without knowing the outcome of the investigations, would prejudice any defendant's right to plead guilty and still preserve the issue of government misconduct.

Sixth Amendment Violation

Finally, defendants allege that the court must vacate the trial date pending the result of the investigations of the taping because they believe they have made a sufficient showing that the taping was done by the government. As the court understands the defendants' argument, they contend that in light of their showing of possible government involvement and in light of the fact that some defendants face very serious penalties if convicted, the court must allow the defense attorneys to fully investigate the matter before trial. Then, defendants can either file a motion to dismiss or suppress before trial, and possibly avoid all the difficulties criminal defendants face during trial. While the court is just as eager as the defendants to "get to the bottom of this," neither the facts nor the law applicable to this issue requires postponing the trial at this time. First, the court finds that at this juncture, defendants have not provided any real evidence that the prosecution team (i.e., the agents or attorneys *in this case*) taped the defendants. Second, the court finds that the defendants have not presented any cases which hold that a court must delay a trial based on the possibility that defendants may uncover evidence to support a motion to dismiss or to suppress. Third, the court will entertain a motion to dismiss or suppress at any point during the trial, and will stop the trial to hold an evidentiary hearing if necessary. Therefore, defendants waive no rights by going forward with the trial. For these reasons, the court will require defendants to go forward with the trial.

Defendants maintain that the taping had to have been done by the prosecution team based on the following factors. First, defendants point out that the taping

occurred in a facility controlled by the federal government. Second, the only electronic equipment brought into the room in which the taping occurred was furnished by the prosecution team. Third, defendants note a few instances in which government agents seemed to know the content of conversations conducted in the meeting room on the 19th floor of the MCC.[4] Finally, the defendants submit an affidavit from Mr. Barry Cauley, the proprietor of a "surveillance detection enterprise," which states that Mr. Cauley preliminarily concludes that the manner in which he thinks the recordings were made, using a primary system and a backup system, is the way law enforcement agents "normally" tape record conversations. *See* Cauley Affidavit at para. 16(a).

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[4] At the status hearing on September 5, 1991, defense counsel described two "coincidental" incidents which he suggested could show that the FBI was the government agency "bugging" the 19th floor conference room. First, he stated that one day while meeting in their room on the 19th floor of the MCC, the attorneys and the in-custody defendants discussed which witnesses the attorneys intended to interview. Then, the next day when the defense attorneys went to interview the witnesses, they found that FBI agents had been there interviewing the same witnesses just an hour before the defense attorneys arrived. Another "coincidental" incident described by defense counsel involved the delivery of the proper electronic equipment to the MCC. When the in-custody defendants first received the reel-to-reel tape recorder from the FBI to listen to the tapes which the government will use at trial, the FBI did not provide speakers. The defense attorneys requested the speakers, but they were not delivered right away. One day the attorneys met with the in-custody defendants on the 19th floor and stated that they planned to file a motion to compel with the court in order to get the speakers delivered. The day after this "threat" was made, the speakers were delivered.

The court finds that while all of the aforementioned factors could be construed as indicating the possibility of government involvement in the taping, none of the factors is specific *evidence* of involvement by the prosecution team. For example, defendants assert as a fact that the taping occurred on the 19th floor of the MCC. Although the court has not heard the tape, for purposes of this motion, the court will deem counsels' representations sufficient to establish that the conversation was taped in the 19th floor conference room. However, even if the taping did occur at the MCC, that does not prove that the anyone from the prosecution team taped the defendants. In other words, even if someone employed by the government did tape the defendants, it is not relevant to the instant case unless the government employee is an attorney or agent assigned to this case or unless the contents of the tapes were communicated to an attorney or agent assigned to this case.

The other factors defendants contend indicate government involvement in the taping are equally inconclusive. As noted above, defendants point to the fact that the government brought electronic equipment to the conference room of the MCC, but no one has shown that any of that equipment was used to make the recordings.[5] Defense counsel discussed the aforementioned "coincidences" at the September 5, 1991 hearings, but they too prove nothing because they could have simply been coincidences. Finally, the court finds that Mr. Cauley's affidavit is perhaps the least weighty factor, because it is based on a

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[5] In fact, defense counsel have argued vigorously that the equipment brought over by the government could not be used to record. It could only be used to listen to tapes.

very preliminary investigation and because it does not even purport to make the conclusion that the prosecution team perpetrated the taping.

In all the cases cited by defendants and the government which analyze Sixth Amendment violations, the threshold issue of whether there was a government intrusion was never disputed. Instead, in all of the Sixth Amendment cases presented to the court, it was conceded that a government agent intruded upon an attorney-client conversation or relationship, and the courts then went on to analyze what, if any, remedy should be imposed. Thus, none of the cases relied upon by the parties even addressed the issue of what quantum of evidence is necessary to show government intrusion.[6] However, the court need not resolve that issue at this juncture because, as noted above, the court finds that the defendants have not even met the most minimal burden of proof in this regard.

Moreover, if and when the defendants present evidence that government agents or attorneys involved in this case caused the taping or were privy to the tapes, the court will then have to address the difficult legal question of what else, if anything, besides the intentional intrusion will have to be shown to make a claim of a Sixth Amendment violation. The Third Circuit, in *United States v. Costanzo*, 740 F.2d 251, 254 (3d Cir. 1984), held that the Sixth Amendment is violated "when the government (1) intentionally plants an informer in the defense

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[6] However, the First Circuit in *United States v. Mastroianni*, 749 F.2d 900, 907-08 (1st Cir. 1984), held that the defendant has the initial burden of showing that confidential communications were conveyed to the prosecution.

camp; [or] (2) when confidential defense strategy information is disclosed to the prosecution by a government informer . . . Similarly, in *Briggs v. Goodwin*, 698 F.2d 486, 493 n.22 (D.C. Cir. 1983), the D.C. Circuit Court stated, that "[a] deliberate attempt by the government to obtain defense strategy information or to otherwise interfere with the attorney-client relationship through the use of an undercover agent may constitute a *per se* violation of the Sixth Amendment."

However, as the D.C. Circuit noted in *United States v. Kelly*, 790 F.2d 130, 137 n.5 (D.C. Cir. 1986), the Sixth and Eighth Circuits have held that "an intentional intrusion alone does not establish a [Sixth Amendment] violation, unless there is communication of confidential information or some other form of prejudice." *Id.*, *citing*, *United States v. Singer*, 735 F.2d 228, 234 (8th Cir. 1986) and *United States v. Steele*, 727 F.2d 580, 586 (6th Cir. 1984). The Ninth Circuit has also taken the position that a showing of intentional government intrusion alone is not sufficient to make out a claim of a Sixth Amendment violation and that a defendant must show that the government used the ill-gotten information against the defendant to his detriment. *See United States v. Irwin*, 612 F.2d 1182, 1186-87 (9th Cir. 1980).

In *United States v. Mastroianni*, 749 F.2d 900, 907-08 (1st Cir. 1984), the First Circuit took a middle position and held that "the defendant must prove that confidential communications were conveyed as a result of the presence of a government informant . . . Upon such proof, the burden shifts to the government to show that there has been and there will be no prejudice to the defendants as a result of these communications."

The Seventh Circuit has not yet spoken on this issue. While this court is inclined to follow the majority of circuits which have indicated that something beyond an intentional intrusion is necessary to make out a Sixth Amendment claim, the court does not so decide at this time because, as noted above, the defendants have not even made a showing of intentional intrusion by the government at this point. Furthermore, the court notes that even if a Sixth Amendment violation is eventually shown, indictment dismissal may not be the remedy imposed. *See United States v. Morrison*, 449 U.S. 361 (1981).

Conclusion

For the aforementioned reasons, the court denies defendants' motion to postpone the trial until after the investigations into the taping are completed. The government has submitted affidavits stating that no government attorneys or agents assigned to this case taped the privileged conversations or have heard the tapes of the conversations. The defendants have submitted no evidence to dispute these affidavits. Therefore, the trial may proceed, and if and when the defendants have sufficient evidence to submit a motion to dismiss, or to suppress, the court will then take the appropriate action including, if necessary, adjourning the trial to hold a hearing.

ENTER:

Ann Claire Williams, Judge
United States District Court

Dated: SEP 25, 1991

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	No. 97 CR 87 (ALL)
	)	Honorable
ERNEST R. INFELISE, et al.,	)	Ann C. Williams
Defendants.	)	[R. 822]

AFFIDAVIT

BARRY CAULEY, being first duly sworn, deposes and upon his oath as follows:

1. I am the co-proprietor of a CounterCom, an electronic surveillance and surveillance detection enterprise of Dallas, Texas.

2. Prior to my work at CounterCom, I was the Security Director of Gearhart Industries of Fort Worth, Texas. Prior to that, I was the Chief Criminal Investigator for Region VII of the GSA-Federal Protective Services. Prior to my position as Chief Criminal Investigator, I served as Chief Electronics Systems Manager for the GSA-Federal Protective Services. Prior to my work in federal law enforcement, I was a criminal investigator with the Dallas, Texas Police Department.

3. In all, I have nineteen years experience in law enforcement in the area of electronic surveillance.

4. I was retained by the defendants in this cause to perform an analysis of the electronic surveillance of surreptitiously recorded conversations in the attorney-client conference room of the nineteenth floor of the Metropolitan Correctional Center-Chicago.

5. In connection with my duties, I have listened to two tapes of the recorded conversations of lawyers and defendants in this case and made aural notations.

6. I have examined the target room, the adjoining day room, mezzanine offices immediately above the target room and photographed same.

7. I have analyzed the duct work, including the air-conditioning and cold air feeds, into the target room and the mezzanine offices above the target room.

8. I have examined the structural building materials of all walls of the target room and analyzed same.

9. I have examined the exterior windows of the target room and analyzed same.

10. I looked for and noted the locations of various telephones.

11. I did a full electronic sweep of the target room.

12. I took measurements of the target room and conducted sound measurements.

13. I conducted tests of voices and ambient noises in and about the target room.

14. I noted the presence of recently installed bars on the doors of the mezzanine offices above the target room, including the presence of saw dust on the floor at the feet of the doors.

15. Upon my return to my Dallas laboratory, I intend to do a digital analysis of both the test tapes and the surreptitiously recorded tapes. This digital analysis ought to be accomplished within twenty-one (21) days.

16. I am able to state certain preliminary conclusions:

a. At least two systems were installed to record,

surreptitiously, attorney-client conversations. It is normal for trained law enforcement eavesdroppers to use two systems, one acting as a backup.

b. The recordings and, therefore, the bugging devices did not come from outside the building (MCC) or from inside the target room. Rather, they were produced from within the building but outside the target room; most likely from the mezzanine offices above the target room using the air-conditioning duct.

c. Neither prisoners nor visiting attorneys could have installed the materials to make such recordings.

d. Some person or persons with access to the locked mezzanine offices above the target room made these recordings. I was told by MCC staff that these offices are locked and that only six keys exist.

e. The surveillance in question was a concerted attack on the target room. The individuals who installed the devices possessed skill, knowledge and expertise in the area of the installation of bugging devices.

f. It would have been with some difficulty and some considerable training to set up at least two recording devices in this location to overhear the attorney-client conversations.

17. FURTHER AFFIANT SAYETH NOT.

_____

BARRY CAULEY

SUBSCRIBED AND SWORN to before me
this 19th day of , 1991.

_____

NOTARY PUBLIC

CounterCom
A Division of EPS, Inc.

12115 Self Plaza
Suite 200
Dallas, Texas 75218
(214) 327-9055

September 23, 1991

Mr. Patrick A. Tuite
Patrick A. Tuite, Ltd. Attorneys
105 W. Adams St., 31st Floor
Chicago, IL 60603

RE: Acoustical Investigation
Metropolitan Corrections Center
Chicago, Ill.

Dear Sir:

On September 18, 1991, David Logan and I, the undersigned, traveled to Chicago from Dallas to perform a technical investigation for which you contracted. This report is an interim report describing what service was performed and our conclusions based on those initial tests and observations.

On our arrival at your office Mr. Logan and I was briefed on the existing situation to wit the possession of cassette tapes of recorded conversations being held between several attorneys and their clients. These conversations took place on or about May 20, 1991, between the hours of 5:00 P.M. and 7:30 P.M. in an area designated as an attorney/client conference area. The room is located directly adjacent to the elevator lobby on the 19th floor of the MCC, Chicago.

Mr. Logan and I listened to the two recovered tape recordings and made notes describing sounds and voices recorded on those tapes. Some items became very appar-

ent. Both tapes had high levels of noise, which may be described as a "ramble" or "roaring" noise. The signal to noise ratio, or the ratio of voice level to background levels, was fairly good on one recording and quite poor on the second recording. The two tapes were basically of the same conversation with one tape starting approximately eight minutes later than the first tape.

We noted the sounds of two different telephone rings, some "squeaking" sounds and some other unidentifiable sounds. However, the predominant sound, excepting the voices recovered, was the rumbling sounds. Mr. Logan and I, both having extensive experience in monitoring and recording conversations, immediately agreed that this sound was probably the result of having a microphone very close to or inside an air duct or that the ambient noise level in the conference room was very high due to mechanical devices such as generators. We believed at that time that the probable cause of the noise was microphone placement in the immediate vicinity of the air duct due to the distinctive sound. This type of audio surveillance is relatively easy, commonly used and effective. However, it is rather unusual to place the microphone in an HVAC feed duct. Most surveillance technicians prefer to place the microphone in the air return system. The movement of air in large volumes will create the type of problem we are listening to on the tapes.

On September 19 we went to the MCC facility where a physical inspection was performed with the intent of locating any existing listening devices and to determine, if possible, where and how the recordings could have taken place. We were met at the facility by the Warden and by Bureau of Prisons personnel, Lt. Buddy Adels-

berger and Criminal Investigator C.H. Mildner III. These two officers accompanied us on our survey. We were also accompanied by Mr. John Mahr of the Joseph Mahr Investigative Agency of Chicago.

Description of the entry and conference room:

The target room is located on the 19th floor of the MCC facility. Access to the room is via the entry control portals located on the first floor. All coats and articles must be locked prior to entering the facility. Additionally, magnetometers leading to the elevators preclude unauthorized equipment from passing this portal. It is totally inconceivable that anyone from the outside could surreptitiously introduce a microphone and tape recorder into this building without official sanction.

The visitor enters the elevator, via a man-trap booth, entry to the various floors are controlled from a remote location.

As you exit the elevator on the 19th floor the conference room is located directly in front of you with only one access portal which is fully controlled by BOP personnel. Upon entering the conference room another door, on the east wall is evident. This door leads to another man-trap and prisoner isolation room.

The room is approximately 15'4" by 2'4" (Drawing A). The walls are constructed of concrete cinder block and the floors and ceilings are constructed of poured reinforced concrete. There are windows on the west, south, and east walls covered by heavy metal bar approximately 1/2" by 1/2". The windows are very dirty and although we had no instrument to measure light transmittance we suspect the windows are glazed and tinted.

As you exit the elevator on the 19th floor the conference room is located directly in front of you with only one access portal which is fully controlled by BOP personnel. Upon entering the conference room another door, on the east wall is evident. This door leads to another man-trap and prisoner isolation room.

The ceiling cover was an acoustical tile type of material glued to the concrete. There was no air space between the tile and the ceiling structure. All wiring for the lights, electrical outlets, fire alarm sensor and junction boxes was surface mounted and in wiremold. The only exception to this was in the A/C air plenum and located on the west wall and ceiling. There were seven (7) junction boxes installed in the plenum and located along the length of the room with cover plates installed. These junction boxes apparently served as lighting outlets at some other time.

The floors are covered by linoleum type of tile glued to the floor. There was nothing significant about the flooring nor the manner of installation.

Lt. Adelsberger stated that the floors above and below the 19th floor were all the same.

There were three acoustical access paths leading from the conference area into horizontally adjacent areas. The first was the HVAC return path, located on the cast wall. This is nothing more than a metal grate installed in that wall under a window. The opposite side of the grate opens into the prisoner Day Room behind the floor officers desk. The second and third openings noted were on the north wall. One of these openings, was approximately 24" by 24" and is installed to service the HVAC riser ducts immediately behind the north wall and the plumb-

ing in that area. The second opening was a smaller door, approximately 14" by 14", located next to the west wall, which would allow service personnel to control water service. There were no access ports or acoustical paths leading to the floor below.

The only acoustical path we found which leads vertically is via the air conditioner vents installed in an air plenum located on the west wall and ceiling. The plenum and air outlets extend the entire length of the room.

Overall, the room is hard from an acoustical viewpoint which means that recordings would exhibit some echo effect and makes possible the recovery of conversations at some distance further than room with softening qualities such as drapes, carpet or clever sound absorbing material. The only sound absorbing material in the room was the ceiling tile and several boxes and cartons located in the room. Ceiling tile installed in this way is not very effective for reducing sound levels as it needs some airspace above the tile for normal use.

Observations and Tests performed:

Because it is obvious that the recordings were illegal by their very nature, we were looking for an acoustical path that would, when monitored or recorded, produce the same type and levels of sound we had aurally examined the day before, and allow some degree of privacy or isolation from the inmates and guards. Our preliminary tests used an electret microphone, audio amplifier and headphones.

As We moved about the conference area listening to the ambient sounds of the room and conversations we noted a total lack of any rumbling or roaring sounds anywhere except when the microphone was placed next to or in the

air condition feed vents located on the west wall. Neither did we recover similar sounds when the microphone was placed in direct contact with the walls, windows or flooring. The ambient noise level of the room was very low and we could not detect any mechanical noise of any type either with the unaided ear or with the microphone/amplifier combination.

It was obvious to us at the time that an illegal surveillance could not take place in any horizontal direction using any wired microphone technique. The cinder block construction is very hard to penetrate, would take a lot of time, and there was no place to perform this activity which would not be in direct view of the guards and inmates. We eliminated the floor for attack because there was no acoustical path found to the 18th floor and because the same visual problems would exist on that floor. The only possible location within the building for attack was the acoustical path via the HVAC duct located on the west wall.

We went to the BOP staff offices directly above the conference room. Entry to the offices was through the mantrap system located on the east wall, into the prisoner, day room, up one flight of stairs and into three locked offices. We did not see any other ingress or egress portals in this prisoner area. We searched these areas for active monitoring devices and found none.

We immediately noticed the floor vents and suspected that the air duct serviced both the conference area and the staff offices. The vents, approximately 6" by 35", are installed over the duct system and are removed by simply lifting the vent covers. There are no retaining screws or other mechanical devices to secure the vents to the floor plenum.

When we removed the floor vent covers we observed the air duct below the vent and verified this was the same air space as the conference room. When we placed a sound source in the conference room and listened in the rooms upstairs we were able to recover the sound source aurally. A microphone placed in that air duct as described in Drawing B recovered room audio from the conference room with the amplified sounds being very similar, and effectively identical to the unaided ear, as those sounds on the recovered tapes.

Mr. Mahr also listened to the recovered sounds for witness purpose. The officers would not listen to the recovered sounds for verification.

We took a test recording sample with a portable tape recorder and on playback again the levels, types of sounds and other characteristics were very close to the recordings we had examined the previous day.

We went to the three rooms and found that rooms 2031 and 2030 produced sound levels more consistent with the examined tapes. Room 2030 produced more favorable results, however, this conclusion is very tentative since we were using our memory to compare the sounds of the recovered tapes.

We searched the air duct visually for evidence of previous monitoring activity. We found nothing substantial except that in Room 2031 the felt insulation covering the air duct had been pulled back about 5" from the southwest top corner of the duct. The glue directly below the felt was dirty and the "damage" was relatively old. There was a cleaned area, about the size of a quarter, directly below the felt which could have been used for a "contact" (as opposed to acoustical) type of microphone.

Conclusions:

Although tentative and somewhat speculative, we believe the recordings took place from within the staff office space directly above the conference area. This is the only area of the building which faithfully reproduced the sounds recorded on the recovered tapes.

Additionally, this is the only area we found in which any privacy could be found by an eavesdropper and is out of view or access to inmates and/or guard personnel. This conclusion does, however, impact the integrity of some BOP personnel since only six keys exist for the offices (per Mr. Mildner) and anyone entering the office areas would require a key for entry.

We noted that security bars were being installed on the air return grates in the doors to these offices. I asked Mr. Mildner the purpose and he stated there had been some burglaries of the offices in which some stamps were stolen with entry via the air return grates.

We do not believe there is any possibility of the defendant's attorneys recording the conversations. First, there is no conceivable way in which a tape recorder could be smuggled past the entry system. Second, it would not seem possible that any person in the conference area could place a recorder anywhere in the room and cause the "rumbling and roaring" sounds recorded on the recovered tapes. This would require someone to physically hold a recorder next to the air vents for the entire conversation in total view of inmates and guards.

Additionally, when we listened to the tapes we noted at the very start of the tape recording some sounds, and possible breathing, that are highly consistent with a microphone being handled and placed in the vent after

the conversations had started in the conference area. We believe that person or persons unknown was actually installing the recording system after the meeting was started. This would seem to narrow any suspect list to persons on the 19th floor at approximately 5:00 P.M., May 20, 1991.

Although the recovered tapes effectively covered the same meeting they are not identical in quality. One tape was very poor quality with a signal to noise ratio which is very low and borders on the unintelligible. The second tape is of much better quality with an intelligible recovery. We suspect that two recording systems were used simultaneously. This suspicion is further bolstered by an apparent difference in AGC (Automatic Gain Control) activity on the two tapes.

An AGC circuit is common to all tape recorders. Its purpose is to control the level of sound being recorded. An AGC circuit attempts to electronically level all sounds to the recording medium. When a person speaks the AGC will tend to lower background noise and when the person stops speaking the background noise will gradually increase to a higher level. The "attack time", or the time span of changing levels, of two recordings appear to my unaided ear to be different. This would again indicate two separate recording systems.

The time loss of eight minutes between the two tapes seems to suggest a scenario whereby an eavesdropper places one system for recovery and then, according to training, may place a second backup system thereby missing some of the conversation due to the time it takes to install the second system. This is common practice for professional eavesdroppers and law enforcement personnel trained in electronic surveillance.

There is another possible answer to the difference in quality of the two tapes. It is entirely possible that the poor quality tape was the original and only tape recording, and that the second better quality tape is an edited, filtered and electronically enhanced copy of the first tape. Since we do not know what generation of copy was sent to the attorneys, nor what duplication process or editing system was used on the original, we can only speculate.

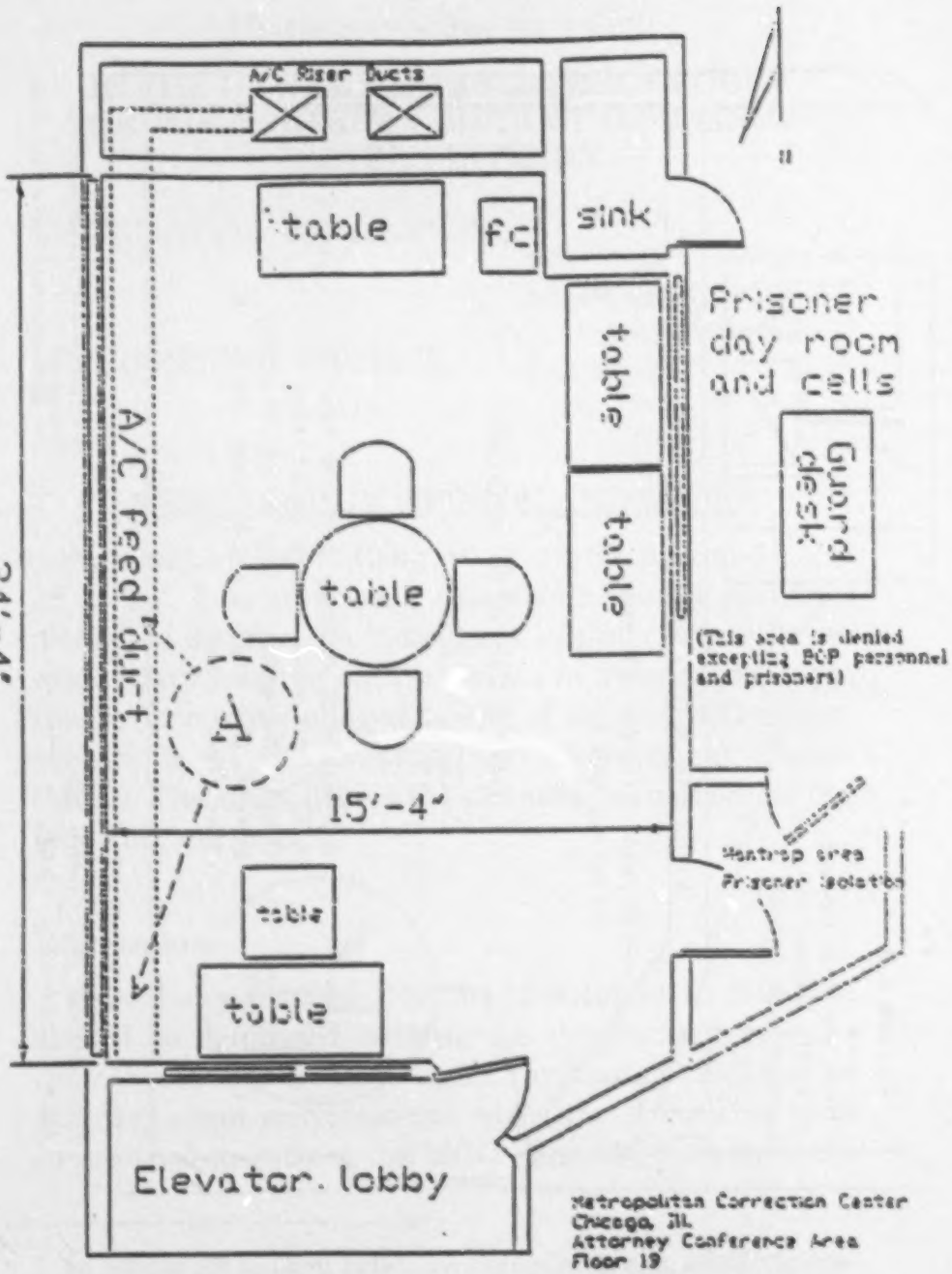
The last preliminary conclusion regards the technical ability of the eavesdropper. We believe that a person with more than average skill in audio recovery techniques recovered and recorded the attorney/client conversations. Acoustics and the recovery of same is not well understood by laymen and the use of the air feed vent suggests a rather in-depth knowledge of this technique. If a second recorder was used, or if the tapes were electronically enhanced, this again suggests significantly greater knowledge of these techniques than the average eavesdropper possesses. It does suggest technical training such as that given to law enforcement personnel.

We are unable to be more specific, or more conclusive, without extensive electronic examination of the recovered tapes. If you require more exacting evidence I suggest that the tapes be subjected to electronic examination by a qualified laboratory or technical staff.

We sincerely appreciate your business and we look forward to serving you again.

Respectfully,

Barry E. Cauley

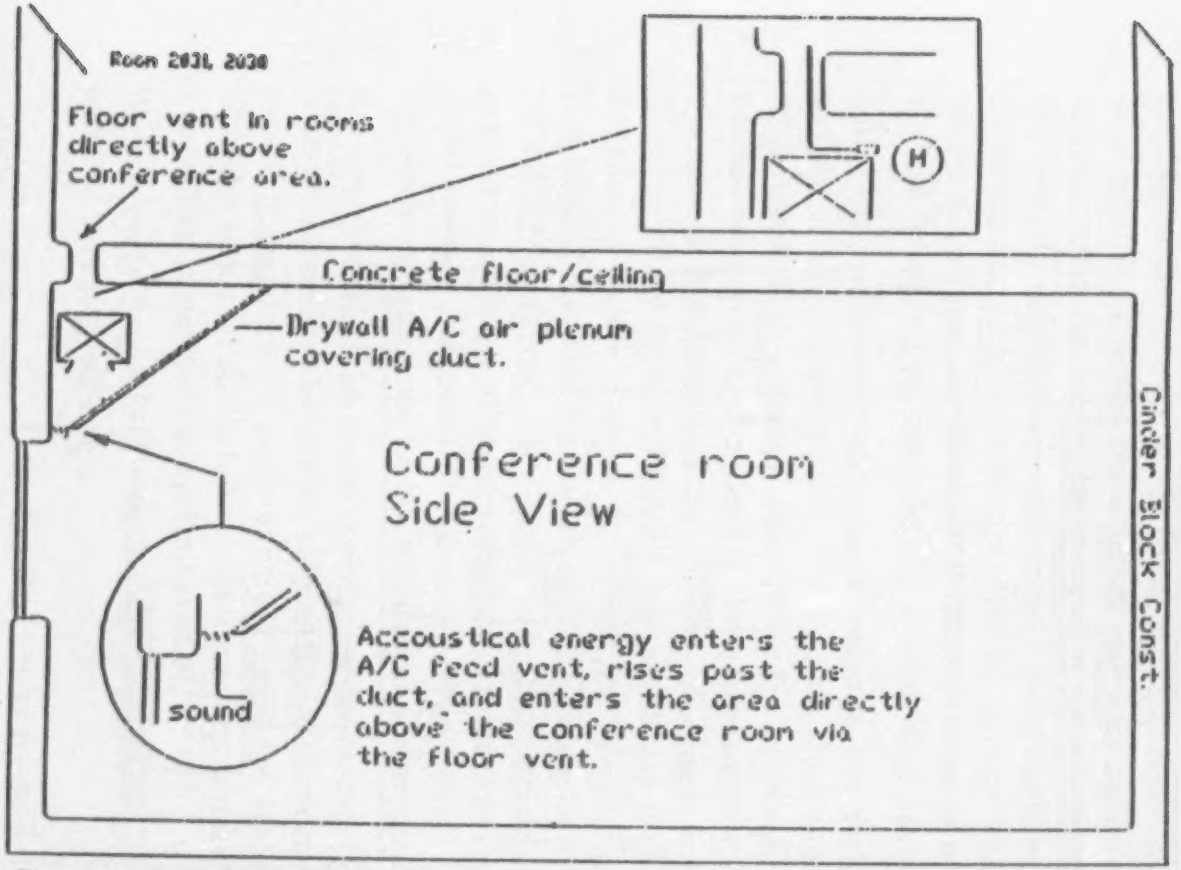


Area (A) is probable location of microphone placement.

Metropolitan Correction Center
Chicago, Ill.
Attorney Conference Area
Floor 19

Approx. scale 1/4"
Drawn by Barry Cauley
Sept. 24, 1991

BEST AVAILABLE COPY


Room 2031, 2030
Floor vent in rooms directly above conference area.
H
Concrete floor/ceiling
Drywall A/C air plenum covering duct.
Conference room
Side View
Cinder Block Const.
sound
Accoustical energy enters the A/C feed vent, rises past the duct, and enters the area directly above the conference room via the floor vent.

(H) Microphone placement for Audio Recovery Test.

Metropolitan Correction Center
Chicago, Ill.
Side View, Attorney Conference Area

Not to Scale
Drawn by barry Cooley, 9-20-91

Drawing B

[Dated September 24, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Case No. 90 CR 87
	)	[R. 1482]
ROCCO ERNEST INFELISE, et al.	)	
	)	

MEMORANDUM OPINION AND ORDER

Pursuant to Fed. R. Crim. P. 12, 16, 29, 33 and 34, and 18 U.S.C. § 2150, *et seq.*, defendants filed a post-trial motion to dismiss the indictment in this case, or for an evidentiary hearing on the motion to dismiss, based on the government's alleged taping of attorney-client conversations at the Metropolitan Correctional Center (MCC). The court denies the defendants' motion for the following reasons.

Discussion

Defendants contend that the indictment in this case should be dismissed because the government violated their Sixth Amendment rights by taping confidential attorney client conversations while the defendants were in pre-trial custody at the MCC.[1] The court set forth the

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[1] In a footnote in their brief, the defendants also allude to possible Fourth and Fifth Amendment violations. The reasoning behind these allegations was not explained by the defendants.

(continued...)

factual background behind this motion in a Memorandum Opinion and Order dated September 25, 1991, and those facts will not be repeated here.

In the September 25, 1991 Memorandum Opinion and Order the court also explained the legal requirements for establishing, a Sixth Amendment violation based on government intrusion. While the Seventh Circuit has not yet addressed the issue, the court noted the standards adopted by other circuits when considering possible Sixth Amendment violations. The court explained that the Third and D.C. Circuits require an intentional intrusion by the government,[2] while the Eighth and Sixth Circuits require intentional intrusion, and the use of the confidential information to the defendant's detriment by the government, before they will recognize a Sixth Amend-

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[1] (...continued)
Nonetheless, the court rejects the Fourth and Fifth Amendment arguments for the same reason that it rejects defendants' Sixth Amendment argument, namely that the defendants do not have any evidence that the government prosecution team was involved in the MCC taping.

[2] See Memorandum Opinion and Order, September 25, 1991, pp. 12-14. *United States v. Costanza*, 740 F.2d 251, 254 (3d. Cir. 1984) (holding that the Sixth Amendment is violated "when the government (1) intentionally plants an informer in the defense camp; [or] (2) when confidential defense, strategy information is disclosed to the prosecution team by a government informer. . . ."); *see also*, *Briggs v. Goodwin*, 698 F.2d 486, 493 n.22 (D.C. Cir. 1983) (Noting that "[a] deliberate attempt by the government to obtain defense *strategy* information or to otherwise interfere with the attorney-client relationship through the use of an undercover agent may constitute a *per se* violation of the Sixth Amendment").

ment violation.[3] In contrast, in the First Circuit the Sixth Amendment is violated when confidential information is conveyed as a result of the presence of a government informant.[4]

The court noted that while the standards for a Sixth Amendment violation varied, at a minimum, all required some level of government intrusion. In the instant case, the court found that the defendants were not entitled to a hearing, or any other relief with respect to the taping until they made a minimal showing that the "prosecution team (i.e. the agents or attorneys in this case)" either "participated or benefitted in any way from the taping of defense counsel and their clients." The court found that the evidence proffered by the defendants at that time did not meet this burden. (See Memorandum Opinion and Order, September 25, 1991, pp. 4, 9, 11, 12). Finally, the court noted that the government prosecution team had submitted affidavits stating that no government attorneys or agents associated to this case taped the privileged conversations or had heard the tapes of the conversations, and that the defendants had submitted no evi-

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[3] *United States v. Singer*, 785 F.2d 228, 234 (8th Cir. 1986), and *United States v. Steele*, 727 F.2d 580, 586 (6th Cir. 1984) ("An intentional intrusion alone does not establish a [Sixth Amendment] violation, unless there is some communication of confidential information of some other form of prejudice."). The Ninth Circuit has also taken the position that a showing of intentional government intrusion alone is not sufficient to make out a claim of a Sixth Amendment violation. The defendant must show that the government used the illgotten information against the defendant to his detriment. *United States v. Irwin*, 612 F.2d 1182, 1186-87 (9th Cir. 1980).

[4] *United States v. Mastroianni*, 749 F.2d 900, 907-08 (1st Cir. 1984).

dence to dispute these affidavits. (Memorandum Opinion and Order, September 25, p. 15). Given these facts, there was no minimal showing of government intrusion, and the defendants' motion for a hearing was denied.

The court now denies the defendants' motion to dismiss the indictment because the defendants still have no evidence of government intrusion. Moreover, the defendants do not have evidence which justifies even an evidentiary hearing on their motion to dismiss. The defendants offer nothing new in their motion to dismiss the indictment. They repeat arguments raised in an earlier motion to delay the trial on the basis of the MCC tapes, but still present no evidence that anyone connected with the prosecution team had anything to do with the taping at the MCC.

Initially the defendants argue, quite generally, that they are entitled to indictment dismissal or an evidentiary hearing because of government intrusion in their attorney-client conversations. Defendants' brief cites a number of cases which analyze Sixth Amendment violations, and many of those cases hold that a government intrusion in the attorney-client relationship, through taping or otherwise, can result in a Sixth Amendment violation. Those cases have little bearing on this discussion, however, because in the cited cases the threshold issue of whether there was a government intrusion was never disputed.[5]

In defendants' cases, it was conceded that a government agent intruded upon an attorney-client conversa-

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[5] *See e.g., Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477 (1985); *United States v. Seale*, 461 F.2d 346, 364-66 (7th Cir. 1972); *United States v. Sutton*, 542 F.2d 1239 (4th Cir. 1976).

tion or relationship, and the courts then considered what, if any, remedy, should be imposed. As is explained below, in the instant case, the defendants never meet the first step, namely showing the existence of government intrusion.

The defendants argue that they have made out a prima facie case of government intrusion in their attorney client relationships, and consequently violation of their Fourth, Fifth and Sixth Amendment rights. The court rejects this argument because a review of the facts indicates that the defendants' case against the government is based on inference. The gist of defendants' argument is, as it has always been, that because the taping occurred in a building that is controlled by the Government, the Government must be responsible for the taping.[6] The court has already stated that the coincidences and defendants' speculation proves nothing. While all of the aforementioned factors could be construed as indicating the *possibility* of Government involvement in the taping, none of the facts is specific *evidence*, of involvement

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[6] Defendants note that the metal detectors would prevent defense counsel, or other outsiders, from bringing any taping equipment into the MCC. Defendants also assert that MCC personnel had access and opportunity to bug, the defendants' meeting room, and that the only electronic equipment brought into the room in which the taping occurred was furnished by the prosecution team. Defense counsel previously pointed out, however, that the equipment brought over by the government could only be used to listen to tapes, and that it could not be used to record. Defense counsel also points to a number of coincidences which they argue show that the government was aware of conversations which took place in defense counsel's preparation room.

of the prosecution team.[7] In sum, the defendants' brief raises the same points that were raised and rejected, in defendants' motion to postpone the trial. See September 25, 1991, Memorandum Opinion, pp. 11-12. These arguments are no more persuasive this time around.

Defendants contend that the importance of this case gave the government a motive to tape the defendants. The defendants contend that the government taped the defendants because it did not want to risk losing the Infelise case. The defendant notes that the government is unable to explain the taping. This argument is unpersuasive. As the government reasons, the principal parties that would benefit from the taping are the defendants, who might obtain dismissal of the indictment based on alleged Government misconduct. Further, since the taping has not been linked to the government, or the prosecution team by any evidence, the government does not have the burden of explaining the taping.[8]

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[7] As the court explained:

> [E]ven if the taping did occur at the MCC, that does not prove that anyone from the prosecution team taped the defendants. In other words, even if someone employed by the government did tape the defendants, it is not relevant to this case unless the government employee is an attorney or an agent assigned to this case or unless the contents of the tapes were communicated to an attorney assigned to this case.

Memorandum Opinion and Order, September 25, 1991, p. 11.

[8] As previously noted, *United States v. Mastroianni*, 749 F.2d 900, 907-08 (1st Cir, 1984), held that the defendant has the initial burden of showing that confidential communications were conveyed to the prosecution.

Relying on cases which are not on point, the defendants suggest that they do not have a burden of production in this matter. They contend that they have made a threshold showing of government interference sufficient to place the burden of proving the government's innocence on the government. The court rejects this argument. First, at least one circuit has noted that in order to show a Sixth Amendment violation, the defendant has the burden of showing that confidential communications were communicated to the prosecution, *United States v. Mastroianni*, 749 F.2d 900, 907-08 (1st Cir. 1984), so defendants' threshold showing argument is not persuasive.

Second, while the court is unaware of any Sixth Amendment cases which address the question of what quantum of evidence is necessary to show government intrusion, they all show that there must be some minimal showing of government intrusion before the court can act. Despite their arguments to the contrary, the defendants in this case have not made a threshold showing of government involvement in the taping. The defendants, in fact, have presented nothing but inference and speculation regarding the government's involvement in the alleged taping, which is not enough to place any burden on the government. Because the defendants have not produced any evidence to make even a minimal showing that the prosecution team was involved in taping the defendants, defendants' motion to dismiss the indictment is denied, and the defendants' motion for an evidentiary hearing is denied for the same reason.

Relying on the principles of disclosure stated in *Giglio v. United States*, 405 U.S. at 154, defendants contend that if it is clear that the Justice Dep't acted in a felonious manner, there is no need to show that the prosecu-

tion team benefitted from their illegal acts. *See also, United States ex rel. Smith v. Fairman*, 769 F.2d 396, 391 (1985). Defendants contend that if anyone from the government illegally taped them, they are entitled to indictment dismissal, or at the very least, an evidentiary hearing.

The court rejects this argument. The cited disclosure principals relate to the disclosure of *Giglio* material, and are not relevant to this discussion, which focuses on the Sixth Amendment. After review of the applicable case law, this court correctly determined that for defendant's Sixth Amendment rights to have been violated by a government intrusion, someone connected to the prosecution team must have been involved in, or learned the contents of the tapes. Defendant's arguments to the contrary are not persuasive.

Further, even if the principals announced in *Giglio* were relevant to a Sixth Amendment analysis, defendants have not presented a compelling argument because there is no evidence that anyone connected with the government was involved in, or knew about the taping. Again, defendants' arguments for indictment dismissal or an evidentiary hearing are rejected, and their motion is denied.

Finally, the court has reviewed the FBI's report on the alleged taping at the MCC, and the FBI's findings are inconclusive.[9] The report indicates that the FBI does not

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[9] The court notes that the FBI's findings are still incomplete, since the bureau has not interviewed the defendants about the tapes. The Bureau will not be able to interview the defendants until after they are sentenced. After the FBI completes their

(continued...)

have any leads, or evidence regarding who was responsible for the alleged taping. As was noted above, the FBI's findings to date are inconclusive, and the report does not contain any evidence that is favorable to the defense or the prosecution.

Conclusion

For the foregoing reasons, the defendants' motion for dismissal of the indictment or an evidentiary hearing are denied.

E N T E R:

Ann Claire Williams, Judge
United States District Court

Dated: SEP 24 1992

[9] (...continued)
report, the court will again review their findings, and the defendants can file another motion to dismiss the indictment.

[R. 2009]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 90 CR 87* Date: February 23, 1994

Name of Assigned Judge: Ann Claire Williams

Case Title: USA v. Infelise/Marino/DeLaurentis/Bellavia/ Aleman

* * * * *

DOCKET ENTRY:

* * * * *

(5) ☒ Status hearing ☒ set for 02 MAR 94 at 9:30 A.M.

* * * * *

(10) ☒ [Other docket entry] *(this order concerns defendants 1,2,3,4,12). The Federal Bureau of Investigation has concluded its investigation into the alleged bugging of conversations between Infelise defendants and their attorneys. The investigation was inconclusive.

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[R. 2032]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 90 CR 87* Date: May 12, 1994

Name of Assigned Judge: Ann Claire Williams

Case Title: United States v. Infelise

* * * * *

DOCKET ENTRY:

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(10) ☒ [Other docket entry] *(this order concerns defendant #1) Pursuant to order entered April 21, 1994 defendant's motion to release justice department report is denied. [1862]

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